SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1788

LOCAL UNIONS NOS. 2188 AND 1974, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LOCAL UNIONS NOS. 2188 AND 1974, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on February 28, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, which is reprinted in Appendix A, is not yet officially reported, but is unofficially reported at 85 LRRM 2576. The decisions and orders of the National Labor Relations Board, printed in Appendix B hereto, are reported at 199 NLRB Nos. 49 and 45, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1974. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board violated its duty to remedy violations of the National Labor Relations Act, as amended, by dismissing the complaints issued by its General Counsel in the cases below without passing on the merits of the unfair labor practice charges filed by the Petitioners.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), (hereafter, "Act"), are set out in Appendix C hereto.

STATEMENT OF THE CASE

A. Factual Background

The instant case was initially the subject of two separate unfair labor practice charges, and involves two plants of Western Electric Company, in Shreveport, Louisiana and Omaha, Nebraska, where the bargaining unit employees in question are represented by Locals 2188 and 1974 of the I.B.E.W., respectively. Both cases involve the same basic issue of whether the Company violated the Act by unilaterally instituting a major structural reorganization in each plant, thereby altering drastically the seniority system in each. In both cases, the changes were made in mid-contract term and over the objections of the Petitioners. At

Omaha, the Company did not even advise Local 1974 before instituting the change.

In each plant, the organizational change involved a splitting up of one large seniority unit ("manager's organization") into two smaller such units. This unilateral division of the existing unit significantly affected the exercise of seniority for purposes of promotions and layoffs, since an employee in the smaller new unit could no longer be considered for promotions to jobs in the larger unit even though he might have been entitled to such jobs by his seniority if the split had not occurred. In each case, the Company contended that it was authorized by the contract to take the action in question. The pertinent contract language was virtually identical in the two collective bargaining agreements.

Both locals filed unfair labor practice charges, alleging that the Company had unilaterally changed the working conditions of its employees in violation of Sections 8(a)(5) and 8(d) of the Act. See, *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421. Complaints were issued by the General Counsel, and the two cases were heard by different trial examiners. One reached the merits of the case and held that the Company had violated the Act as alleged (Shreveport). The other recommended dismissal of the Complaint pursuant to the Board's new deferral policy announced in *Collyer Insulated Wire,* 192 NLRB 837 (Omaha).

B. The Board's Decision and Order

The Board, upon appeal, dismissed both complaints, holding that the disputes involved matters covered by the grievance and arbitration provisions contained in the respective collective bargaining agreements. In

both cases, the Board retained jurisdiction for the limited purpose of entertaining a motion for further consideration upon a showing that either the dispute had not been resolved or submitted to arbitration, or that the grievance and arbitration procedures had not been fair and regular or reached a result repugnant to the National Labor Relations Act. The Board's disposition of the two cases was based on its rule of deferral established in *Collyer, supra.*

C. The Decision of the Court of Appeals

Both locals subsequently filed petitions for review pursuant to 10(f) of the Act with the United States Court of Appeals for the District of Columbia Circuit, and the two cases were consolidated by the Court. In its opinion of February 28, 1974, the Court of Appeals affirmed the Board's decisions and approved the *Collyer* deferral doctrine. Although the Court recognized that the Board had previously only deferred to arbitration *awards,* it concluded that deferral to prospective use of arbitration *procedure* was also within the power of the Board. The Court did indicate that it would not approve deferral where arbitration would impose an undue financial burden upon one of the parties or where it would prevent an orderly exposition of the law in question.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises An Important Question in the Administration of the National Labor Relations Act.

The unfair labor practice complaints issued by the General Counsel in these cases alleged that Western Electric Company had violated Sections 8(a)(5) and 8(d) of the Act by reducing the seniority unit at each of the plants involved during the life of a collective

bargaining agreement without bargaining with the Petitioners on that subject. The Board, applying the doctrine enunciated in *Collyer Insulated Wire, supra,* dismissed the complaints and remitted the Petitioners to arbitration under the contracts over the question of whether the Company's actions had violated the agreements. It refused to pass on the specific question which Petitioners sought to have the Board adjudicate, *viz,* whether the Company's actions had violated its *statutory* duty to bargain under Sections 8(a)(5) and 8(d).

In *Collyer,* the Board decided, by a 3-2 vote, that it would henceforth defer to the contractual arbitration process, even though not invoked, where contractual and statutory issues overlapped and the former were subject to arbitration. The Board declared that:

> ". . . each such case compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." (192 NLRB at 841.)

Under *Collyer,* exhaustion of contractual arbitration procedures is required by the Board, without congressional sanction, as a condition precedent to the exercise of its own unfair labor practice procedures and the granting of remedial relief pursuant to Section 10(c) of the Act.

We recognize that only last week, in *William E. Arnold Company* v. *Carpenters' District Council, etc.,* 42 U.S. L. Week 4754 (May 20, 1974), this Court referred with approval to the Board's *Collyer* doctrine, stating that that "position harmonizes with Congress'

articulated concern that, '[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .' Section 203(d) of the LMRA, 29 U.S.C. § 173(d)." (*Id.* at 4755.) However, that statement was unnecessary to the result in *Arnold,* and none of the briefs in *Arnold* disputed the *Collyer* rule. Thus, the Court's discussion of *Collyer* in *Arnold* "lacks the precedential weight of a case involving a truly adversary controversy", at least with respect to that issue. *Bob Jones University* v. *Simon,* 42 U.S. L. Week 4721, 4725, n. 11 (May 15, 1974). To treat *Arnold* as dispositive would be particularly inappropriate since, as we develop below, the *Collyer* decision conflicts in principle with this Court's discussion of arbitration and its relation to statutory remedies in *Alexander* v. *Gardner-Denver Company,* 42 U.S. L. Week 4214 (February 19, 1974). For it is our basic position, developed in our briefs below—although not discussed in the court's opinion—that the Board's *Collyer* policy is flatly inconsistent with Congress' deliberate choice to provide alternative remedies to a party which asserts rights both under a collective bargaining agreement and under the National Labor Relations Act.

Moreover, the decision in *Alexander* was not considered in any of the Court of Appeals' decisions which have approved *Collyer.* In addition to the decision below, see *Nabisco Inc.* v. *NLRB,* 479 F.2d 770 (2nd Cir.) *Associated Press* v. *NLRB,* — F.2d —, 85 LRRM 2440 (D.C. Cir.); *Enterprise Publishing Company* v. *NLRB,* — F.2d —, 85 LRRM 2746 (1st Cir.); *Provision House Workers Union Local 274, AFL-CIO* v.

NLRB, — F.2d —, 85 LRRM 2863 (9th Cir.).[1] Indeed, none of the opinions of the appellate courts attempts to reconcile *Collyer* with Congress' policy of "concurrent, overlapping remedies". *NLRB* v. *Strong*, 393 U.S. 357, 360.[2]

The validity of the *Collyer* doctrine is a question of unusual importance in the administration of the National Labor Relations Act. We are advised that, as of May 20, 1974, the Board has deferred under *Collyer*, by formal decision, approximately 58 cases alleging violations of the Act,[3] and that, as of February 28, 1974, approximately 225 additional charges were pending before the Board's Regional Offices on deferral under *Collyer*.[4] The foregoing does not take into account those situations, whose number will undoubtedly increase, where potential unfair labor practice charges are not filed at all because the aggrieved party, knowing that the Board would withhold its hand pending arbitration, is unwilling to accept the cost and delay attendant upon the *Collyer* policy. Indeed, the General Counsel, acknowledging the enormous impact of the *Collyer* doctrine on the processing of unfair labor practice charges, took the unusual step of issuing, on February 28, 1972, a 23-page memorandum of Guidelines to the National Labor Relation Board's Field Offices for handling cases in which the *Collyer* deferral policy

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[1] Petition for Certiorari pending, No. 73-1593.

[2] This is perhaps not surprising, since in none of the cases, except the present case, did the petitioning party rely on that policy in its opposition to *Collyer*.

[3] Statistics obtained through Executive Secretary of National Labor Relations Board on May 28, 1974.

[4] Statistics obtained through General Counsel of National Labor Relations Board on May 28, 1974.

might be implicated.[5] And, on May 10, 1973, following expansion of that policy in subsequent Board decisions, the General Counsel issued a 60-page memorandum of Revised Guidelines, reprinted at 83 LRR 42.

2. The Decision Below Conflicts In Principle with Decisions of This Court and Is Inconsistent with the Statutory Scheme Intended by Congress.

A. In *Collyer,* the Board avowedly accommodated two aspects of the national labor policy. In doing so, it has overlooked this Court's repeated reminders that the Act provides alternative remedies before the Board on the one hand, and the courts or arbitrators on the other, where rights under the statute and under a collective bargaining agreement may be asserted in the same circumstances. These are "overlapping, concurrent regimes neither preempting the other." *NLRB* v. *Strong,* 393 U.S. 357, 360.

(i). Although the Board places its principal reliance on judicial approval of its *Spielberg* doctrine,[6] which accords respect to arbitration awards already rendered, that doctrine and *Collyer* are materially different. As described in *Collyer,* the *Spielberg* case, "established the now settled rule that [the Board] would limit its inquiry, in the presence of an arbitrator's award, to whether the procedures were fair and the results not repugnant to the Act." 192 NLRB at 841. That policy was reiterated in *International Harvester Co.,* 138 NLRB 923, 925-926, *enfd. sub nom. Ramsey* v. *NLRB,* 327 F.2d 784 (7th Cir.), *cert. denied* 377 U.S. 1003. *International Harvester* was in turn expressly approved by this Court in *Carey* v. *Westing-*

[5] See BNA Labor Relations Yearbook, 1972, p. 258.

[6] *Spielberg Manufacturing Company,* 112 NLRB 1080.

house Corp., 375 U.S. 261, 270-271. Neither that rule nor this Court's approval of it authorizes the Board to refuse to exercise its jurisdiction where the party asserting the violation of a statutory right has chosen to file an unfair labor practice charge rather than proceed to arbitration. Indeed, in its brief to this Court in *NLRB* v. *C & C Plywood Corp.,* 385 U.S. 421, the Board explained the *Carey* decision in terms upon which we cannot improve:

> "In *Smith* v. *Evening News Association,* 371 U.S. 195, and *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261, the Court consequently held that the duplication of statutory requirements in the contract did not preclude Board jurisdiction but merely created two remedies for the same conduct—a Board remedy and a contract remedy—between which the allegedly aggrieved party might ordinarily choose. In thus upholding the Board's power, the Court noted that, in appropriate circumstances, the Board might properly choose not to exercise its jurisdiction. Specifically, the Court recognized that, where the collective agreement contains an arbitration clause, *the Board has ordinarily declined to exercise its jurisdiction in situations where that would permit a party to a prior arbitration proceeding to relitigate before the Board questions already determined by the arbitrator,* provided that 'the procedure [before the arbitrator] was a fair one and the results were not repugnant to the Act'; the Court also noted that the Board may also defer decision because of the pendency of arbitration. See *Carey* v. *Westinghouse Electric Corp., supra,* at 270-271. The Court, however, *did not suggest that the Board might*—and it certainly did not intimate that it must—*decline jurisdiction merely because of the possibility of a co-existing arbitral or judicial remedy.*"[7]

[7] Bd. Br. #53, Oct. Term 1966, pp. 12-13, footnote omitted, emphasis supplied.

And, in a footnote at the end of the foregoing passage the Board quoted pertinent passages from *Smith* and *Carey* as follows:

> "On the contrary, in *Smith,* the Court specifically stated (371 U.S. at 197): 'The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301.' And, in *Carey,* the Court noted (375 U.S. at 268): '[A] suit either in the federal courts, as provided by § 301(a) * * * or before such state tribunals as are authorized to act * * * is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him.' The Court added (*id.,* at 272): 'The superior authority of the Board may be invoked at any time.' "[8]

The *Collyer* doctrine is a mocking echo to this Court's assurance that the "superior authority of the Board may be invoked at any time."

(ii). In *Alexander* v. *Gardner-Denver Company,* 42 U.S. L. Week 4214 (February 19, 1974), this Court recently considered the interplay of the arbitration process and a related statutory procedure (there Title VII of the Civil Rights Act of 1964) and concluded that the doctrine of concurrent jurisdiction governed. The Court held "that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII [of the Civil Rights Act of 1964]," (*Id.* at 4217, n. 6) since the legislative history of Title VII created a "clear inference . . . that Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination." (*Id.* at 4217-4218.)

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[8] *Id.* at p. 13, n. 9.

The reasoning of the Court in the context of Title VII is equally applicable and equally compelling under the National Labor Relations Act. Indeed, the Court so indicated:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964). Cf. *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962). There, as here, the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each. Thus, the rationale behind the election of remedies doctrine cannot support the decision below."
>
> (*Id.* at 4218; footnotes omitted.)

The Court continued as follows:

"Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:

> '[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

"If an arbitral decision is based 'solely on the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of his submission,' and the award will not be enforced. *Ibid.* Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless whether certain contractual rights are

> similar to, or duplicative of, the substantive rights secured by Title VII."
>
> (*Id.* at 4219; footnotes omitted.)

The Court therefore noted that an employee who files a Title VII action is "asserting a statutory right independent of the arbitration process." *Ibid.* Similarly, one who files a charge before the National Labor Relations Board is "asserting a statutory right independent of" contractual rights.

B. *Smith, Carey* and *Strong, supra,* respect the deliberate choice of Congress under the National Labor Relations Act, as does *Alexander* under Title VII. For, when the House-Senate Conference chose to vest in the courts jurisdiction to enforce contracts by § 301, it also took pains to state in its Report accompanying the revised bill, which became the Act, that:

> "By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 52.

That is the statutory policy which governs when a party files an unfair labor practice charge with the Board, and the *Collyer* doctrine cannot be squared with it. For, instead of the concurrent jurisdiction mandated by Congress, *Collyer* subordinates the statutory remedy before the Board to the contractual remedy before an arbitrator.

There is nothing in the *Collyer* opinion which indicates any appreciation of the significance of Congress'

decision to provide two different forms of relief where rights under both a contract and the statute can be asserted. Plainly, Congress took this step to promote enforcement of those rights. This could be accomplished only if the aggrieved party has the choice of remedies. That choice is a valuable one. In the very context of arbitration this Court has said that:

> "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result." *Bernhardt* v. *Polygraphic Company of America,* 350 U.S. 198, 203.

And, in *Alexander,* the Court again recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." (42 U.S. L. Week at 422, quoting from *U. S. Bulk* v. *Arquelles,* 400 U.S. 358, 359-360 (Harlan, J., concurring)).

C. As we have noted earlier, *Collyer* gives only limited assurance that the public interests in an outcome which is consistent with the statute will be achieved: The Board retains jurisdiction to revive the case if for some reason the arbitration does not take place, or if the procedures are not fair or the outcome is "repugnant to the Act." The Board could not have done less if it were to preserve any semblance of the protections created by §§ 7 and 8 of the Act. But this procedure is itself so onerous that it represents an independent ground for disapproving the *Collyer* doctrine. What is entailed is a three-step procedure: 1) a Board proceeding going as far as necessary to determine that the case is appropriately one for deferral; 2) the arbitration; and 3) another Board proceeding to determine whether the arbitration complied with the *Collyer*

standards. Dealing with a comparable situation in *C & C Plywood, supra,* this Court said:

> "If the Board in a case like this had no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts, labor organizations would face inordinate delays in obtaining vindication of their statutory rights. Where, as here, the parties have not provided for arbitration, the union would have to institute a court action to determine the applicability of the premium pay provision of the collective bargaining agreement. If it succeeded in court, the union would then have to go back to the Labor Board to begin an unfair labor practice proceeding. It is not unlikely that this would add years to the already lengthy period required to gain relief from the Board. Congress cannot have intended to place such obstacles in the way of the Board's effective enforcement of statutory duties. For in the labor field, as in few others, time is crucially important in obtaining relief." 385 U.S. at 429-30 (citation omitted).

In approving a Board decision not to defer to arbitration, Judge Blackmun, then writing for the Eighth Circuit, distilled the essence of *C & C,* and its companion case, *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432:

> "We detect in the two decisions a desire, and perhaps even a policy, on the part of the Court to give impetus to the various ways of settling labor disputes; to expedite these matters; to avoid delay either in the courts or in the arbitration process; to emphasize and protect, in cases of doubt, and to give priority to, statutorily declared rights; to regard as no more than secondary any contract interpretation aspect of what is regarded as basically an unfair labor practice dispute or as merely related to primary Board function under the Act; to take a broad, and not a narrow or technical,

approach to the Act and to the multiplicity of channels available for resolving disputes; and not to close the door upon Board expertise when such restraint is clearly not violative of congressional mandate." *NLRB* v. *Huttig Sash & Door Co.*, 377 F.2d 964, 969-970.

The *Collyer* decision represents the opposite approach to the law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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May 29, 1974

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1994

LOCAL UNION NO. 2188, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

WESTERN ELECTRIC COMPANY, INC., *Intervenor*

No. 72-1995

LOCAL UNION NO. 1974, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

WESTERN ELECTRIC COMPANY, INC., *Intervenor*

Petitions for Review of Orders of the National Labor Relations Board

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Decided February 28, 1974

Laurence J. Cohen, with whom *George Kaufmann*, was on the brief, for petitioners.

Jonathan G. Axelrod, Attorney, National Labor Relations Board with whom *John S. Irving, Jr.*, Deputy General Counsel, *Patrick Hardin*, Associate General Counsel, *Elliott Moore*, Acting General Counsel and *Joseph E. Mayer*,

Attorney, National Labor Relations Board were on the brief for respondent. *Marcel Mallet-Prevost,* Assistant General Counsel, National Labor Relations Board at the time the record was filed also entered an appearance for respondent.

Lawrence M. Joseph with whom *Michael A. Hertzberg* was on the brief for intervenor.

Gerard C. Smetana filed a brief on behalf of the Chamber of Commerce of the United States of America, as *amicus curiae* urging affirmance. *Burt A. Braverman* entered an appearance for the Chamber of Commerce of the United States as *amicus curiae.*

Before: McGowan, Tamm and MacKinnon, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* Tamm.

Tamm, *Circuit Judge:* The petitions in these consolidated cases [1] seek review of two separate decisions of the National Labor Relations Board each of which invokes the Board's policy of deference to the process of arbitration. In No. 72-1994, *Local 2188, IBEW v. NLRB and Western Electric Co.* and No. 72-1995, *Local 1974, IBEW v. NLRB and Western Electric Co.,* the Board has declined to reach the merits of unfair labor practice complaints against Western Electric Co. because contracts between the parties provide for grievance and arbitration procedures. Since the facts of these two cases are virtually identical, they will be discussed together.

I.

Both cases arise from disputes regarding certain organizational changes at two plants of the Western Electric Company at Omaha, Nebraska and Shreveport, Louisiana. In 1969, the Omaha employees were restructured into three

[1] These proceedings were consolidated by order of this court on November 28, 1972.

"manager's organizations" whereas there had formerly been only two such groups. In 1970, a similar change was made at the Shreveport plant, creating two manager's organizations in place of one. The significance of these changes, for present purposes, is that the contractual provisions governing movement of personnel (i.e. promotion, downgrading and lateral transfer) at both plants are keyed to the concept of a manager's organization. For example, an employee can be considered for transfer within his manager's organization, but cannot ordinarily move from one manager's organization to another. Section 2.1(c) of Article 27 of the Omaha contract is illustrative:

> When a vacancy occurs, employees of the Company who have qualifications for the vacancy will be considered in successive steps in the following order until the vacancy is filled:
>
> . . . .
>
> (c) Graded employees in successively lower grades from within (1) the Assistant Manager's organization having the vacancy for vacancies in grade 34 and lower, or (2) the Manager's organization having the vacancy for vacancies in grade 35 and higher or in the JOURNEYMAN TRADES OCCUPATIONS or JOURNEYMEN from within the Manager's organization having the vacancy.

Similar provisions are found in the section governing layoffs. The union argues that as a result of the company's organizational changes, a literal reading of the words "manager's organization" will drastically affect seniority rights of employees since each worker's field of movement will be restricted to the new, smaller manager's organizations. The union does not contest management's right to reorganize the plants but urges that the employee movement provisions should be applied as if the Omaha plant still had only two manager's organizations and the Shreve-

port plant still had only one. The Company insists upon a literal reading of the words "manager's organization" and plans to administer employee movement on the basis of the new organizational structure at each plant. As a result of this impasse, each local filed unfair labor practice charges, alleging that the company has unilaterally changed the working conditions of its employees in violation of section 8(a)(5) of the National Labor Relations Act. In each case the Board dismissed the complaint, noting that the dispute involves a matter covered by the grievance and arbitration procedures contained in the labor contract. In both cases the Board retained jurisdiction for the limited purpose of entertaining a motion for further consideration upon a showing that either: (a) the dispute has not been resolved or submitted to arbitration; or (b) the grievance and arbitration procedures have not been fair and regular or have reached a result repugnant to the National Labor Relations Act.

II.

The Board's disposition of these two cases followed the rule established by its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971). In that case, like the present one, the Union had charged the employer with effecting a unilateral change in working conditions. The employer defended the charge on the ground that its actions were authorized by the contract. Alternatively, the employer argued that the dispute ought to be resolved under the grievance and arbitration procedures contained in the contract. The Board agreed:

> We find merit in Respondent's exceptions that because this dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes. We conclude that the Board is vested with authority to withhold its processes in this case, and that the contract

> here made available a quick and fair means for the resolution of this dispute including, if appropriate, a fully effective remedy for any breach of contract which occurred. We conclude, in sum, that our obligation to advance the purposes of the Act is best discharged by the dismissal of this complaint.

Id. at 839.

It should be understood that the *Collyer* decision and those now under review are not based upon any right of the employer to compel the union to utilize grievance procedures rather than file charges with the Board. Rather, they proceed from the Board's asserted power to withhold its processes when to do so will best serve the policies of the Federal labor laws. The *Collyer* doctrine has been applied by the Board in numerous subsequent cases and has received judicial approval in the Second Circuit. *Nabisco, Inc. v. NLRB,* 479 F.2d 770 (2d Cir. 1973).

The union attacks the present dismissals on alternative grounds. It is argued: *first,* that the *Collyer* doctrine is an illegal abdication of the Board's duty to remedy unfair labor practices; and, *second,* that even if *Collyer* is valid, it was erroneously applied in these two cases. Both arguments must fail.

First of all, the *Collyer* rule of deferral to grievance and arbitration procedures is clearly valid.[2] It is well established that the Board may decline to take jurisdiction of a complaint if, in its judgment, Federal labor policy is best served by leaving the parties to voluntary settlements. This principle has been approved in this Circuit, *Office & Professional Employees Local 425 v. NLRB,* 419 F.2d 314 (D.C. Cir. 1969), and cited with approval by the Supreme Court. *NLRB v. Plasterers' Union,* 404 U.S. 116, 136-37

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[2] Another panel of this Court has reached the same conclusion in a somewhat different case. Associated Press v. NLRB, No. 73-1002 (D.C. Cir., February 20, 1974).

(1971); *Carey v. Westinghouse Corp.*, 375 U.S. 261, 270-71 (1964), *quoting International Harvester Co.*, 138 NLRB 923, 925-26 (1962), *aff'd sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964). *See also Smith v. Evening News Ass'n*, 371 U.S. 195, 198 n.6 (1962). These authorities contemplate Board deference to arbitration awards issued *before* the filing of unfair labor practice complaints. *Collyer* and the decisions under review go a step further, however. In these cases the Board dismissed unfair labor practice complaints even though arbitration had not been initiated. *Collyer* is not the familiar case of deferral to an arbitration *award*, but deferral to the arbitration *procedure* which is available but not yet invoked. Like the former class of cases, the *Collyer* decision relies upon the Federal labor policy expressed in section 203(d) of the Labor Management Relations Act:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

We believe that this declaration of policy applies in the prearbitral *(Collyer)* context as well as in the post-award context. We also believe that this policy supports prearbitral deferral since the grievance and arbitration procedure is the only remedy left to a party from whom the Board withholds statutory relief. It should be clear, however, that the fostering of one policy may be detrimental to another policy, *viz.*: that expressed by the Congress in granting the Board power to remedy unfair labor practices. Certainly the Board appreciated this ambivalence in its *Collyer* opinion:

> Thus, this case like each such case compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the

statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices.

192 NLRB at 841. We read the *Collyer* doctrine as a balancing rule which requires deferral to arbitration only where a balance of both supporting and antagonistic policies favors deferral. The operation of this balancing process is demonstrated by the *Collyer* opinion itself. There the Board considered five factors bearing upon the probable effectiveness of arbitration to advance Federal labor policy:

1. the history and quality of the parties' collective bargaining relationship;
2. the absence of anti-union animus;
3. willingness of the respondent party to arbitrate;
4. the scope of the arbitration clause;
5. suitability of the dispute to resolution by arbitration.

Id. at 842. In *Collyer* all of these considerations favored deferral. Elaborating on the fifth point, the Board noted that the factual bases of the statutory claim and of the contractual dispute were so intertwined that resolution of the contractual issue by arbitration might be dispositive of the statutory (unfair labor practice) issue:

> The contract and its meaning in present circumstances lie at the center of this dispute. In contrast, the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes . . . . That threshhold determination is clearly within the expertise of a mutually agreed-upon arbitrator.

192 NLRB at 842. This congruence between the contractual dispute and the overlying unfair labor practice charge is significant. If it were not present, the Board's abstention might have constituted not deference, but abdication.

Our endorsement of the *Collyer* rule would be incomplete without one further comment. While the Board's promise to overrule arbitration awards which are irregular or repugnant to the Act is a necessary condition to the legality of pre-arbitral deferrals, it is not a sufficient one. Put another way, the fact that any ultimate award must conform to the policies of the Act does not guarantee that deferral itself is consistent with the Act. Pre-arbitral deferral might constitute an effective denial of any remedy if, for example, arbitration of the dispute would impose an undue financial burden upon one of the parties. Dismissal of the complaint in such a case would be contrary to the policies of the Act although all other criteria for application of the *Collyer* doctrine are met.[3] Deferral might also be unjustified where it prevents an orderly exposition of the law in question. Successive arbitration awards could produce a variety of ad hoc solutions to the same problem, all consistent with the Act, but no uniform rule. In such circumstances further abstention by the Board might be contrary to Federal labor policy.

Having approved the *Collyer decision*, it remains for us to determine whether the principle of that case was properly applied in the cases at hand. We note, first of all, that the results of an arbitration will very likely be dispositive of the unfair labor practice issue: if the award adopts the union's construction of the term "manager's organization" for purposes of the Articles govern-

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[3] A similar concern was expressed by Board Member Jenkins in his dissent from the *Collyer* decision. 192 NLRB at 854-55.

ing "Movement of Personnel", then the company's compliance with this decision would moot the instant unfair labor practice complaints; if the company's construction prevails, of course, there will be no basis for the charge of unilateral action. This likelihood alone strongly supports the Board's decision to dismiss the complaint pending the outcome of grievance and arbitration proceedings. Examination of the other factors considered in *Collyer* does not dissuade us from this view. The dispute is clearly within the scope of the grievance and arbitration procedures at both the Omaha and the Shreveport plants.[4] The company has expressed its willingness to arbitrate.[5] There is no suggestion of anti-union animus such that deferral to arbitration would be a futile gesture; nor does the history of the collective bargaining relationship of the parties indicate that arbitration would not be fruitful. We cannot conclude that the Board has abused its discretion by referring the parties in these cases to the grievance and arbitration procedures provided in their contracts.

Petitions denied.

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[4] Shreveport Contract, Article 10, ¶ 1, Article 11, ¶ 1, I J.A. at 414-15; Omaha Contract, Article 9, ¶ 1, Article 10, ¶ 1, II J.A. at 574, 576.

[5] Letter from Mr. T. H. Jackson to Mr. J. A. Burnett, February 18, 1971, I J.A. at 406; Trial Examiner's Decision at 15, II J.A. at 24. The initial refusal of the Omaha management to arbitrate was apparently based on its mistaken belief that the union was challenging its right to reorganize the plant. As we have noted, the union's only complaint concerns the interpretation of contract provisions governing movement of personnel.

APPENDIX B

199 NLRB No. 45

D—6525
Omaha, Neb.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 17—CA—4233

WESTERN ELECTRIC, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1974, AFL-CIO

Decision and Order

On January 14, 1972, Trial Examiner A. Norman Somers issued the attached Decision in this proceeding. Thereafter, General Counsel and Charging Party filed exceptions and supporting briefs, and Respondent filed a brief and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed; provided, however, that:

Jurisdiction of this proceeding is hereby retained for the limited purposes stated in the Remedy section of the attached Decision.

Dated, Washington, D.C.

RALPH E. KENNEDY, Member
JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

For the reasons set forth in my dissent in *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB No. 150, I think the Board should not delegate its authority to the arbitrator. Therefore, I would proceed to the merits of the case.

Dated, Washington, D.C.

JOHN H. FANNING, Member
NATIONAL LABOR RELATIONS BOARD

TXD-8-72
Omaha, Neb.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case No. 17-CA-4233

WESTERN ELECTRIC, INC.
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. 1974, AFL-CIO

Gerald A. Wacknov, Esq., of Kansas City, Mo., for the General Counsel.

Lawrence M. Joseph, Michael Hertzberg, and *James Cutlip, Esqs., (Robert A. Levitt, Esq.)*, of New York, N.Y., for Respondent.

David D. Weinberg, Esq. (Weinberg & Weinberg), of Omaha, Neb., for Charging Party.

Trial Examiner's Decision

STATEMENT OF THE CASE

A. NORMAN SOMERS, Trial Examiner: This case, with all parties represented, was tried before me on April 8, 9 and 22, 1971, in Omaha, Nebraska, on the complaint issued by the General Counsel on February 1, 1971, on a charge filed by the Union on March 12, 1970. The violation alleged is that of Section 8(a)(5) and (1) of the Act. The General Counsel asserts that the Company at its Omaha Works, had, without prior notice to the Union, split up a production division termed the "400 manager's organization" into two smaller ones, termed the "400" and the "100" organizations, and that this altered the collective-bargaining agreement and changed established working conditions of the employees. The Company's defense, in essence, is that its actions were economically motivated and in conformity with the contract, so that the case at most presents a contract dispute for referral to the contract's grievance-arbitration procedures.

The parties at various stages of the hearing presented oral argument on the issues and have also filed briefs, all of which have been duly considered. On the entire record and my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTIONAL FACTS

Respondent, a New York corporation, makes communications equipment, such as cable and telephone apparatus. It has numerous plants or facilities throughout the country, including one in Omaha, known as the Omaha Works, where it receives materials and ships products across State lines in amounts exceeding $50,000 a year in each category. As is not disputed, Respondent is engaged in commerce within the meaning of the Act.

The Union is a labor organization within the meaning of the Act.

II. The Alleged Unfair Labor Practices

A. *Issue*

The alleged violation of Section 8(a)(5) and (1) of the Act stems from the Company's action, unilaterally taken as claimed, in splitting off from a production division, or "Manager's organization," termed the "400," certain operations, which it established as another Manager's organization, termed the "100," thereby making two such organizations, each smaller than the 400 as it was before. Under Article 27 of the collective-bargaining contract, titled "Movement of Personnel" (here reproduced in pertinent part and attached as Appendix A), the outermost range of jobs (or "corridor of movement") available to an employee for upgrading (i.e. promotion to a higher grade), lateral transfer (at the same grade to another kind of work), or demotion (for bumping if "surplused" on his own job), are jobs that are within the employee's Manager's organization.[1]

The General Counsel claims that the Company by its unilateral action in thus splitting up the 400 and narrowing the scope of their job mobility altered provisions of the contract and changed established working conditions. The Union claims this action "diluted" or "diminished" the employees' preexisting seniority rights. It claims that whether or not the Company has the right by such a split to restructure its supervisory setup, it does not thereby have the right during the life of the contract unilaterally to reduce the employees' job mobility to the shrunken dimensions of the two Manager's organizations created by the split.

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[1] For promotion and transfer at grades 35 and higher, the job must be in the employee's Manager's organization, and at grades 34 or lower, it must be in the employee's Assistant Manager's organization. Art. 27, par. 2.1(c). Displacement, or "bumping" rights of an employee who is surplused on his own job are limited, whatever the grade, to jobs in the surplused employee's own Manager's organization. *Id.*, par. 3.11(b).

The Company, to the contrary, claims that it could do just that under Article 27, the Movement of Personnel clause, taken in connection with Article 2, the management rights clause.[2] It claims, however, that the breadth of these management rights, in all their starkness, are not reached here because of its own self-restraint in their exercise. The Company asserts it did give the Union advance notice of the split (though it had no obligation to do so), and even if it failed to do so, no harm was done, since before any employee sustained any detriment by the limitations of job movement created by the split, it bargained in good faith with the Union concerning its effects under Article 27. It claims it reaches the ultimate in the "management rights" it thus possesses under the contract only if it were to be found that it did not thus restrain itself. That is, even if it did not give prior notice, as it claims it did, and even if its negotiations concerning the effects of the split on the employees fall short of meeting good-faith requirements, it is still immune under the Act as long as the actual effects of the limits thus placed on the employees under Article 27 are "minimal," which it claims they were here, whatever their potential effects (which it in any event claims were likewise "minimal"). Respondent accordingly claims that the case at most involves a dispute over the interpretation of the contract, which calls for relegating the parties to the grievance-arbitration clauses of the contract.

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[2] ARTICLE 2—MANAGEMENT OF THE BUSINESS: The right to manage the Plant and to direct the work forces and operations of the Plant, subject to the limitation of this Agreement is exclusively vested in, and retained, by the Company.

B. *Background: The Practice Preceding the Split of the 400*

The Company opened its Omaha Works in April 1956.[3] The Union was certified in March 1957 (for a bargaining unit of all production and maintenance employees at that Omaha facility). The parties have had continuous contractual relations since May 1957, all contracts having had their effective starting dates in May of 1957, 1960, 1963, 1966 and 1969 (this last being the one during which the split of the 400 was made and which was current at the time of the hearing). Some divisions, or Manager's organizations, are engaged in other than unit work, but the supervisory structure, or "chain of command," in all Manager's organizations, consists, in descending line of authority, of (a) Assistant Managers, who head up the "subbranches," or "Assistant Manager's organizations," (*supra*, n. 1) within the Manager's organization; (b) the heads of the departments within the Assistant Manager's organizations; and (c) the section chiefs under the department heads.

In May 1957, the only Manager's organization comprised of employees doing unit work was the 200. The entire working force of the Omaha facility, then located at the Company's "pilot plant," consisted of a few hundred employees, performing simple operations at the lowest grades (*supra*, n. 1) of 32, 33, 34 (as distinguished from the additional higher grades, from 35 and above, *ibid.*, which came in the wake of later expansion of the Company's operations). The unit work at this stage consisted of cross-bar work, which, stated most generally, is work done on cables and wires that have already been made.

Article 27 of the contract has existed in substantially its present form from the time of this first contract in 1957. That clause, as stated (*supra*, n. 1), limits the "Movement of Personnel" to jobs within the Manager's organi-

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[3] All references to the Company or Respondent are to the Omaha Works, plant, or facility, unless otherwise indicated.

zation for grades 35 and higher and within an Assistant Manager's organization for grades 34 and lower. (*Id.*, par. 2.1(c).) That is to say, although under paragraph 1.2, seniority is given "most weight" when two or more employees "under consideration" are equally qualified (under par. 1.3) for the post, nevertheless the post must be in the Manager's organization (at grades 35 and higher) or Assistant Manager's organization (at grades 34 or lower) if the employee is to be "under consideration" at all for it. *Id.* at par. 2.1(c). And in the event of a force reduction, the surplused employee's bumping rights are limited to such jobs within the Manager's organization (whatever the grade, equal to or lower than his) for which he is deemed qualified by previous experience. *Id.* at par. 3.11(b).

The Movement of Personnel clause, as it has existed from the outset, was included in this first contract of 1957 over the Union's objection, in which it had urged, unsuccessfully, for movement of personnel based on seniority (and other requisite qualifications) on a plantwide basis across organizational lines. The Union thus realized that the Company intended to create more than the one Manager's organization then existing.[4]

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[4] Confirming this were two witnesses who had participated in the 1957 negotiations on behalf of the Union. Howard Iske, who is now part of management as a section chief, had in 1957 been the Union's president. He testified "both sides knew that when the permanent plant was occupied, that there would be more Managers, or at least assistant managers." Frank R. Vondra, who is now an IBEW International Representative, had, while an employee in the Omaha Works, participated on behalf of the Union in all the contract negotiations from 1957 on, including the one in 1969, when he was then the president. He was its president also in November 1969, when the Company split the 400. In describing the meetings between Union and Company about the split after it was made (*infra*, n. 10), Vondra admitted that the Union had known from the beginning what Article 27 meant. Vondra also admitted that in 1960, 1963 and 1966, the Union again asked for plantwide job mobility and was again unsuccessful.

By January 1, 1959, with the expansion of operations, the Company moved from the "pilot plant" to the "permanent plant" (*supra*, n. 4). The 200 was by then engaged also in actually making wires and cables. This is a more highly skilled operation than cross-bar work, which, as stated, is work done on the wires and cables after they are made. The Company then removed the cross-bar work from the 200 and established it as a new Manager's organization, the 400. Apparently, this split was not preceded by prior notice to the Union. And after the split was made, the Union, although it has the right, under paragraph 1.4 of Article 27, to object to any move made by the Company under Article 27, raised no such objection in this instance.[5]

From then on until November 15, 1969, these were the only two Manager's organizations, each in their own separate buildings, the "Cable" and the "Crossbar." Such splits as the Company made thereafter were of Assistant Manager's organizations within these two Manager's organizations. The Union's witnesses testified that in each instance the Company gave it "prior" notice of these splits.[6] The Union filed no prior objections to these splits before their effective dates. After these splits, those in which the Union raised objections under Article 27 (*supra*, n. 5) and which involvd extended negotiations, were two of the four splits made in subbranches,—or Assistant Manager's organizations, within the 400,—namely, one made on

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[5] Under paragraph 1.4 objections to a move under Article 27 (if filed within 10 days) may be processed under the grievance and arbitration procedures of, respectively, Article 9 and 10 of the contract. The pertinent portion of Article 10, and arbitration clause appears *infra*, n. 18.

[6] J. O. Bosworth, Manager of the labor relations division, and the Company's designated "Bargaining Agent for the Omaha Works," testified it was but a "courtesy" extended to the Union about the same time that the Company announced the splits to the supervisors of the Assistant Manager's organizations there involved.

December 1, 1960 and the other on March 1, 1966.[7] While these grievances based on the effects of the splits were pending, the Company, by arrangement with the Union, maintained a single corridor of movement for the employees (at grades 32, 33 and 34, *supra*, n. 1) in the two subbranches (the 420 and the 450), who had had similar work experience. The single corridor of movement was applied for the two subbranches in combination as if there had been no split, even though, for the Company's supervisory purposes, each subbranch was headed by a separate Assistant Manager. When the 420-450 grievances were settled, the Company, by arrangement with the Union on November 11, 1966, continued the single corridor for these employees that had been hired before November 11, 1966 for still 3 more years until November 11, 1969. The arrangement is embodied in what is termed the "Interpretive Contract Guide."[8] The Guide states that after that cutoff date of November 1, 1969, the employees involved in the 420-450 dispute "shall no longer be considered for single corridor treatment" and "[h]enceforth all movement of personnel will be in accordance with the contract."

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[7] The four splits of Assistant Manager's organizations in the 400 occurred on April 15, 1959, December 1, 1960, March 1, 1966 and September 1, 1969. After these splits, no objections were made under Article 27 in respect to the earliest one of April 15, 1959. The fourth one, occurring September 1, 1969, was followed by an objection involving one or two employees, which was immediately settled, and did not entail the extended negotiations in respect to the effects under Article 27 of the second and third such splits,—those made on December 1, 1960 and March 1, 1966, discussed in the text.

[8] The "Interpretive Contract Guide" (which is attached to the contract of 1969), covers all 40 articles of the contract. At the hearing, the parties agreed that the Guide covering Article 27 concerns the specific situation there dealt with and neither controls nor is a binding precedent in respect to future situations. However, insofar as a future situation may have elements in common with those embodied in the Guide, they may, as the parties also agree, be referred to for whatever bearing they may have on the parties' course of practice.

C. *The 400-100 Split and the Ensuing Meeting Concerning It*

1. Absence of prior notification

The split on November 15, 1969, of an entire Manager's organization, the first one in the nearly 11 years since the 400 was established, was a jolting one to the Union in view of its massiveness (reducing the size of the 400 from about 4,000 to a little under 2,500) and its suddenness, since the Union had had no inkling of any such thing even being under consideration.[9] Officials of the Union testified the Union learned of the split near Thanksgiving Day (or about November 25), when a union steward mentioned it to Michael Quinlan, then the Union's executive board chairman. Quinlan (who is now the Union's president) testified he "nosed around" among some section chiefs, who confirmed it, and he then relayed this to Vondra, then the Union's president (*supra*, n. 4). Vondra testified that he was surprised because he had discussed union matters with Bosworth, the Company's "Bargaining Agent" (*supra*, n. 6), as recently as November 21, who had said nothing about it. Vondra testified he then called Bosworth, who confirmed the split had been made. Vondra said he was

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[9] Bosworth (*supra*, n. 6) testified the Company had long been considering the supervisory level at which to handle a continuing increase in the quantity of the work orders and the size of the working force of the 400. Though this was already under consideration during the contract negotiations in May 1969, Bosworth admittedly said nothing about it to the Union during these negotiations, and as later appears, when he was asked during the negotiations whether the Company contemplated a change, the answer though not explicit conveyed the negative. Bosworth testified that by September, 1969 the split of the 400 was definitely in contemplation and that the final decision to make the split was reached about a week before its effective date, i.e. about a week before November 15, 1969, and about the time of the expiration of the lengthy "single corridor" arrangement concerned with the earlier split, previously described, of two Assistant Manager's organizations, the 420 and 450.

"highly disturbed" by it, and the two then arranged for a meeting of the parties on December 1, to discuss the matter.[10]

Bosworth, on the other hand, testified that the arrangement for the first meeting was initiated by a call he made to the Union's office the morning of Friday, November 14, in which he informed Vondra of the split. As earlier stated, the Company deemed itself under no obligation to give such prior notice, and as Bosworth testified (*supra*, n. 6), the notices given during these earlier mentioned splits (in the subbranches) were a "courtesy" extended to the Union at about the time that the Company announced them to the respective supervisory staffs.

The weight of the evidence supports the testimony of Vondra, that the Company, when it split the 400, in mid-November, 1969, did not extend the Union even that "courtesy." Bosworth's claim that he did so is undermined by the affidavit he filed on April 8, 1970 before a Board agent, after the Union filed its charge. He then stated that on November 15 (which at the hearing he corrected to November 14, since the 15th was on a Saturday, a non-working day), the Company "announced" the split (which, at the hearing, he explained meant an "announce[ment]" in writing to the supervisory staff). The only reference to the Union was the statement that "union members were informed of the change on November 15, 1969." The affidavit makes no reference to any communication to either Vondra or any other officials of the split.[11]

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[10] There were five meetings in all. Three were held on December 1 and 8, 1969 and February 18, 1970 (before the Union filed its charge). Two later ones were held on November 19 and December 3, 1970 (before the complaint issued).

[11] On redirect examination 2 weeks later (the hearing having been postponed because of other commitments of various counsel), Bosworth attributed this omission to the fact that the Board agent had not asked him whether he informed Vondra or other union officials of the split. This was a singular self-imputation of in-

Bosworth also testified that in that same talk he claimed he had with Vondra the morning of the 14th, he informed him that the split was only "administrative" (i.e. for ordering materials, scheduling operations and making products) but that its "implementation" on the employees under Article 27 was being suspended for 3 months. Vondra testified he had not been informed of such a distinction and that when the subsequent meetings began, although he and the union officials knew of no instances in which any employee had yet concretely felt the impact of Article 27, there was nothing in what Bosworth told him which indicated that the split was other than in effect for all purposes. Respondent's own minutes of that first meeting, held December 1, as well as of the second one, held December 8 (*supra*, n. 10) show that the suspension of implementation, or a "grandfathering" of the employees was a proposal by the Company, and not something which it had already instituted the same time as the split. Bosworth testified, however, as he indeed told the Union at these meetings, that the operations split off from the 400 had a different "experience factor" from the operations retained in the 400, so that even if each Manager's organization had a separate corridor of movement, the actual impact, or specific consequences, on the employees would be "minimal." Indeed, by the end of these 3 months, i.e. on February 18, 1970, the Union could point to but one instance in which an employee had during these 3 months been deprived of a promotion he would otherwise have gotten but for the fact that the job was outside his Manager's organization. That lone instance involved R. I. Beardsley, an employee in

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nocence on the part of one of Bosworth's responsibility and knowledge in the field. His affidavit dealt with the Union's charge, which abounds in the accusation that the Company acted "unilaterally" in making the split. The statement in the affidavit that "union members were informed" of the split the day the Company "announced" it to the supervisors was thus intended as the Company's maximum means of having the information of the split reach the Union.

the 400, who on February 9, 1970, was bypassed on a job in the 100 in favor of an employee in the 100 over whom he had more seniority and at least equal qualifications. The Company a few days before the hearing finally sustained Beardsley's grievance, and at the hearing attributed the bypassing of Beardsley within those 3 months to an "inadvertence." This last is found to be an afterthought; the proposal for a 3 months' suspension had been rejected by the Union, and the bypassing of Beardsley is found to have been the result of the 3 months' suspension not being then regarded as in effect.[12] As appears from the meetings

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[12] The job for which Beardsley had been bypassed on February 9, 1970 was a grade 36 crane operator's job in the 100. It went to one O'Donnell, an employee in the 100, over whom Beardsley had more seniority and at least equal qualifications (Beardsley having had 5 years experience in operating a crane and O'Donnell, so far as appears, none). Thus, under paragraph 1.2 of Article 27, the job would have gone to Beardsley, except that he was barred from it under paragraph 2.1(e), which requires that to be upgraded to a job at grade 35 or higher, the job must be in an employee's Manager's organization. *Supra*, n. 1. By February 18, 1970, the grievance on behalf of Beardsley (which had been filed February 9, 1970, the day of the bypassing), had gone through four of the five steps prescribed by the contract. These four steps were at all four supervisory levels of the 100 from the section chief up to James Dunn, the manager of the 100. In each instance the grievance was rejected under par. 2.1(e). The fifth, or final step, before Bosworth, as the Company's "Bargaining Agent," reached him in writing on March 3, 1970. Later meetings of the parties, held November 19 and December 3, 1970 (*supra*, n. 10), show Bosworth to have been fully aware of that grievance and to have offered to "settle" it only if the Union relented on three alternative demands later described, which included a demand that all the employees should be grandfathered from the effects of the split under Article 27 for the duration of the contract instead of the shorter period proposed by the Company. A few days before the hearing, the Company finally upheld Beardsley's grievance, and at the hearing attributed the bypassing of Beardsley during those first 3 months to the fact that the placement list, which omitted Beardsley's name, had been issued some time before the end of these 3 months. It took the Company the 14 months up to a few days before the hearing to conclude that this was an "inadvertence" despite the

later discussed, the Union insisted that the employees be grandfathered from the effects of the split under Article 27 for the duration of the contract and rejected the 3 months moratorium as proposed by Bosworth. Further, the Company, after the first 3 months had passed, was asserting that during the first 3 months it had suspended putting Article 27 in force on the employees and that it was in full effect on the employees from then on.

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fact that all at four supervisory levels the grievance had been rejected on the ground that Beardsley was barred from that job under paragraph 2.1(e).

At the hearing Respondent added that the bypassing of Beardsley had been "inadvertent" for the additional or alternative reason that Dunn, the manager of the 100, had thought Beardsley's seniority over O'Donnell to have been overcome by the fact that Beardsley was not as qualified for the job regardless of Beardsley's 5 years experience and O'Donnell's apparent absence of any experience as a crane operator. Dunn, in his memorandum on February 18, 1970 rejecting Beardsley's grievance, stated "the job vacancy was filled with the qualified employee [i.e. O'Donnell] in accordance with *paragraph 2.1(c)*." (Emphasis added.) In his testimony, Dunn, after admitting vagueness of recollection stated that by the use of the word "the" he meant he had regarded O'Donnell "much more qualified" than Beardsley at that job, and that he had compared the two men. But if that had been so then Beardsley would have been "under consideration" with O'Donnell for that job within the meaning of paragraph 1.2 and the rejection of the grievance would have had to be on the ground that he was not as qualified as O'Donnell within the meaning of pars. 1.2 and 1.3. Yet he rejected the grievance on the ground that he was barred from that job under paragraph 2.1(e).

When the grievance was finally sustained, at the fifth step, the Company offered Beardsley the job in the 100 on which he had been bypassed. Beardsley now declined it because he had interveningly been advanced to a grade 36 job in his own 400 (for which he was qualified) that paid more than the one in the 100. (The job in the 100 was "day-time." The one in the 400 was "incentive.")

2. The meetings

The split in an entire Manager's organization, the first, as stated, in the nearly 11 years since the 400 was established, with not a word concerning it of the kind that had been given it when there had been splits in merely Assistant Manager's organizations, evoked deep anxiety, which the Union voiced at that first meeting, concerning what was now in store for the employees. Bosworth told the Union that the effects would be "minimal" because the operations transferred from the 400 to the 100 had different "experience factors" from those retained in the 400. See *infra,* n. 17. The Union was not inclined to accept Bosworth's forecast on faith and inquired about what was in store for older employees in the event of a reduction in force (since their bumping rights, based upon jobs in which they had had prior experience, were limited to those in their own Manager's organizations, *supra,* n. 1). Bosworth stated that Article 27 would be applied against them "as it reads," but repeated the effects would be "minimal." The Union then stated that if the effects would indeed be minimal, there should be no objection to the Company's grandfathering the employees for the duration of the contract. Bosworth rejected this unqualifiedly. This anomaly evoked from the Union the comment, as appears in the Company's minutes of the first meeting (*supra,* n. 10) that the Company "has something up its sleeve." Bosworth denied this and stated that the Company was not likely soon again to split up a Manager's organization, but if it did it would "come up with some arrangement." The Union stressed that even assuming the ultimate accuracy of Bosworth's forecast concerning the actual effects of this split on the employees, if the Union were now to acquiesce in a shorter grandfathering than the duration of the contract, it would, as the Company's minutes of the meeting of December 8, 1969 quote the Union, be "bargaining away what we have already gotten." Bosworth replied the Company did not "see it that way."

Pursuing the same thought, the Union, as quoted in the Company's minutes of the meeting of February 18, 1970, stated that whatever the actual outcome on the employees of *this* split, if it were now to agree to grandfathering of the employees only for a period short of the duration of the contract, it would "set a precedent [which] could be used as a tool to split the group up into many more pieces." The Union observed that the "[m]atter boils down to [the] interpretation of the contract. Manager was [a] convenient description of either Cable or Crossbar shop in general." Bosworth replied, as the Company's minutes quote him (2/18/70):

> We interpret it literally. A Manager is a Manager. We all know what a manager is. The contract is clear.

However, the Union at this point reminded Bosworth that at the negotiations of the 1969 contract in May, he had in answer to a question put to him by Violet Rogers, a member of the negotiating committee, conveyed that the Company did not contemplate a change. The Company's minutes quote Bosworth's response to this to be:

> I was aware of this being considered—I don't think this question was really asked.

Quinlan, now the Union's president, who had been a member of the negotiating committee during the 1969 contract negotiations, testified Rogers did ask this of Bosworth and that his answer, though not explicit, clearly conveyed the negative. That point came up again at the meeting of the parties 9 months later after the Union filed the charge in this proceeding. On November 19, 1970, the Union again put the question to Bosworth concerning whether he had not at the 1969 negotiations said the Company contemplated no change. His reply this time, as quoted in Respondent's own minutes, was that in the negotiations he said, "I was *not* aware at that time of such a move." (Emphasis added.) This implied, contrary to what he told

the Union on February 18, 1970, that that question had been put to him during these negotiations. And his admission that during these negotiations he told the Union he was not "aware" of any such move confirms Quinlan's testimony that Bosworth conveyed a negative answer during the contract negotiations concerning whether the Company contemplated a change. The Union at this meeting of November 19, 1970, accordingly claimed that had the term "manager" intended to be "literally" interpreted it would not have agreed to the contract as it reads.[13] The interchange in this later meeting just quoted (*supra*, n. 13) followed the line of the discussions at the meetings which preceded the Union's filing of the charge (*supra*, n. 10). The Union's insistence on a grandfathering of the employees for the duration of the contract was based on its view that the employees' job mobility had been stabilized as of the time the 1969 contract was made, where the only Manager's organizations had been the 200 and the 400. At all events, in view of Bosworth's certainty that the actual consequences on the employees would be minimal, the Union continued to press Bosworth concerning why the grandfathering, or "1-manager concept" was not extended to the

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[13] In the Company's minutes of the meeting of November 19, 1970, appears the following colloquy between union representatives and J. O. Bosworth:

> OE [Eby, who had succeeded Vondra as president]: For the record: We bargained the contract in good faith on the basis of 1 manager in the X-bar building.
>
> JOB: That's not so.
>
> OE: For many years before 1966 you moved between 2 assistant managers as if they were one.
>
> JOB: But when we signed the contract we all agreed as to what "Manager's Organization" meant.
>
> TH [Tim Hickman, IBEW International Representative]: If that were true, we'd have had this meeting during the last bargaining session instead.
>
> OE: I agree with Tom, we'd not have agreed if we had known what you have in mind.

end of the contract, when they could then take up an issue which had not been raised during the 1969 negotiations. The Union compared this with the accommodation the Company had made in the 420-450 situation, involving two Assistant Manager's organizations, where after the split, it maintained a single corridor of movement of the two Assistant Manager's organizations combined, during the years it took to have the matter ironed out. Bosworth's reply, as he is quoted in Respondent's minutes of the meeting of December 8, 1969, was, "We had to give up a lot to get the 420-450 straightened out," and then, when asked, "You don't want it an issue in bargaining," he replied, "Yes. Want it settled before bargaining which means now.

The groundwork for the futility of the meetings was thus already laid that early. Though the Company was willing to extend the moratorium on Article 27 beyond the 3 months it had proposed, it resisted extending it to the duration of the contract because of the leverage it might give the Union in negotiations for the succeeding contract.[14] The Union made three proposals: (1) that the employees be grandfathered for the duration of the contract; (2) or that they be grandfathered while Article 27 is "reopened" for discussion of the effects of the split (in the manner of the "reopening" that occurred when there had been the 420-450 split) or (3) or that the matter go to arbitration. (The pertinent portion of the arbitration provision, Article 10, is quoted *infra*, n. 18) Bosworth rejected

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[14] At the hearing, Bosworth, in explanation of his statement that he "[did] not want it an issue in bargaining," testified (Tr. 313):

> I indicated to the union, that I was unwilling to grandfather the people to the end of the contract because when you set up a precedent and you go into contract bargaining the practice that exists at contract bargaining puts an entirely different light on how I get backed into a situation which makes it difficult to rearrange.

all three proposals during the three meetings preceding the Union's charge.[15]

Bosworth also rejected these three alternatives at the two later meetings held after the charge. (They were held in response to the urgings of counsel to their respective clients that they try to reach a solution.) The two meetings are covered in this instance by minutes of the Union as well as the Company. The minutes of both parties show their original positions had not changed. By then the Union's complaints over the effects of the split went somewhat beyond Beardsley's case previously described (and which was then still pending. See *supra*, n. 12). They concerned occurrences after the expiration of the first 3 months following the split. The Union complained that about 10 employees in the 100 had been promoted from grade 34 jobs to "selector" jobs at grade 35, while there were hundreds of employees in the 400, at grade 34, who had more seniority than the 10 upgraded employees in the 100. Except for two employees (in addition to Beardsley's case) there was no specific indication that these hundreds of employees at grade 34 in the 400 had at least equal qualification for the higher graded jobs to which the employees

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[15] The Company's minutes of the meeting of February 18, 1970, show the following colloquy between Vondra and Bosworth after the reference to the answer Bosworth had given Committeewoman Rogers during the 1969 contract:

FRV—We want this to be held up—so we can negotiate this into the contract.

JOB—I think we have already negotiated this into the contract. Willing to have "grandfather" for a period.

FRV—For the duration of the present contract?

JOB—NO!! DEFINITELY NOT!! This is not new to the I.B.E.W. although maybe not at Omaha.

FRV—We will contest this if we can't agree. We want only a "reasonable" time.

JOB—We think 3 months is reasonable and that period is already past.

FRV—We'll let NLRB decide.

in the 100 had been promoted (as, for example, the way in which Beardsley, *supra,* n. 12, had both more seniority than and was at least as qualified for the higher graded job as the employee in the 100 in favor of whom he had been bypassed). Bosworth, as he is quoted in the Company's minutes, stated, "This number is small in proportion to the total number of people involved overall," to which one union representative replied, "One is too many," the point being as further stated by another union representative, "[we] don't feel we have the right to bargain away the 'right' of our people in this matter." Bosworth stated, "we have offered an understanding on these people but it was refused by the Union." The Union regarded the offer as inadequate because it did not take care of employees who might feel the impact of Article 27 during the remaining period of the contract. This was pointed up in the following colloquy as appears in the Company's minutes of the meeting of 11/19/70:

> WC: What if we have 4 more Manager Splits? What will you do then?
>
> JOB: I've told Tom [Hickman, the International Representative] we'd follow the same route again.
>
> WC: You'd implement the program if we couldn't agree anyway.
>
> JOB: That's so.
>
> WC: We can't accept this type of unilateral move.

That is how matters remained before the complaint issued. The fifth and final meeting held December 3, 1970, shows Bosworth summing up, with union acquiescence, the Union's three-point proposal thus:

> (1) Continue under 1 manager to the end of the contract.
>
> (2) Re-open contract, or
>
> (3) Submit to arbitration.

Bosworth, after a caucus of the Company's negotiator stated, "We find your offer unacceptable," and in its plac offered to "move under the one manager concept to th end of this year [to January 1, 1971]." This was a mer 4 months before the end of the contract and 2 before th start of negotiations for the succeeding contract. Th Union found this unacceptable, first because interveningl some employees might still be victimized under Article 2 by the present split, and because of the previously mer tioned fear of the "precedent" under which the Compan could during the life of an existing contract, split that 40 Manager's organization still further and correspondingl narrow the employees' corridors of movement to th shrunken dimensions of each splinter thus newly create by the split. The Company, on the other hand, saw in th Union's demand for a grandfathering of the employees fo the duration of the contract a leverage the Union migh have in negotiating a change in Article 27 that would lesse its power under the "literal" language of Article 27 as existed, and instead wanted its own leverage to perpetuat that power. (See Bosworth's previously quoted testimon *supra,* n. 14, in explanation of his "don't want it an issu in bargaining" statement to the Union as quoted in th Company minutes of the meeting of December 8, 1969

4. Status as of the time of the hearing

In addition to the upgradings of about 10 employees i the 100 who are junior to those in the 400, as mentioned b the Union in the last two meetings of the parties, the Unio on the last day of the hearing, put into evidence the Com pany's very recent notifications of a surplusing of som 10 employees in the 400, who had more seniority than corresponding number of employees in the 100.[16] Unio

[16] The notifications were given the Union under Article 34 of t contract, which requires the Company to give advance notificati to the Union of varieties of personnel action. Among them a "[l]ay offs due to lack of work" and "[n]ew and rehired e

counsel's suggesting that the split had to that extent reduced the number of jobs the surplused employees in the 400 could have turned to for bumping purposes in the 100 was resisted by Bosworth because there was no indication of what those other jobs in the 100 were, and whether, apart from seniority, the surplused employees met the additional requirement, in respect to bumping, of being qualified by prior experience to fill those jobs in the 100. *Supra*, n. 1, Art. 27, par. 3.11(b).[17]

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ployees." (It is on that basis that the Union was able to compare the seniority of the 10 surplused employees in the 400 and of employees in the 100 over whom these surplused employees had seniority. On that basis also the Union knows of the upgrading of employees. The pertinent item there is "[t]ransfers involving changes of an employee status.")

[17] Bosworth explained that the operations retained in the 400 were those of wiremen, cable formers, and testers of apparatus, while those transferred to the 100 consisted of punch press, drill press and screw machine operations and also operations in a subbranch termed "Merchandise and Service." He testified the operations in both organizations had differing lines of experience. However, he admitted that there was some overlapping between the work of the two organizations. He testified these overlappings involved "muscular kind of work" such as "material handling jobs" (which concerned less than 1 percent of the total work force), and work of packers and stockkeepers, which could involve two or three occupations comprised of some 30 or 40 persons (T. 391). With one exception, the surplused employees in the 400 are all "wiremen" at grade 32 (the lowest of grades) who had been employed during 1970 (after the split) but who, when surplused, had the requisite minimum seniority over persons in the 100. Though the work of wiremen is different from the work in the 100, Harlan (Whitey) Clark vice president and the main grievance representative of the Union, testified that on the basis of his 7 years experience in grievance handling, he could state that had there not been the split, these surplused wiremen in the 400 could have bumped such employees on jobs now in the 100, as press operators, material handlers, assembly operators, and "what have you." There was no specification of which employees in the 100 could have been bumped by the surplused employees in the 400, and how under their work as "wiremen" they would have acquired the requisite experience to qualify them for other jobs in the 100 to entitle them to displace employees junior to them.

D. *Analysis and Conclusion*

(1) The Company's belated proposal for arbitration

Although during the meetings of the parties, Respondent had rebuffed the Union's overtures for arbitration, now it is the Company that embraces it and the Union that opposes it.[18] The issue the Company proposes is whether, when it has split up a Manager's organization, the Company is nevertheless obligated by the contract to continue the employees under the single corridor of movement, described in Article 27, as it had existed before the split, or whether the split, when made, creates a separate corridor of movement for each separate Manager's organization, with the Company having the option to decide whether and for how long to suspend its implementation on the employees under Article 27. That issue has a familiar ring. It sounds much like the one the Union had been proposing during the meetings, and the Company was rejecting. Toward the close of the hearing, Company counsel proposed this issue for arbitration as the basis for disposing of the controversy. Union counsel opposed it first because it does not take care of the Company's alleged violation of Section 8(a)(5) in not having given the Union prior notice of its action and also because the issue the Company proposes is excluded from arbitration under Article 10 as one "related . . . to the exercise of any of the Company's rights of management." *Supra*, n. 18. Vondra and Quinlan of the Union credibly testified that it was on that very ground

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[18] ARTICLE 10: ARBITRATION

1. Any dispute arising between the Union and the Company with respect to the arbitration of any provisions of this Agreement or the performance of any obligation hereunder, except where the subject matter of the dispute is excluded from Arbitration by other provisions of this Agreement, or is related in any manner to the exercise of any of the Company's rights of management may be referred [to arbitration on exhaustion of the grievance procedure under Article 9].

of non-arbitrability that Bosworth, at the meetings, had rejected the Union's overture for arbitration. The Company, in its brief, however, explains that at the meetings the Union's proposal did not specify the issue to be arbitrated as required by Article 10 (*id.* at par. 5), and so it was uncertain whether the Union was then challenging the Company's right to make the split but only its effects, but that at the hearing the Union having now made it plain that it did not challenge the Company's right to make the split but only its effects on the employees under Article 27, it is now an eminently arbitrable issue for submission to the arbitrator.

What the Company claims the Union made plain at the hearing is not that plain to the General Counsel, for he disputes the Company's right to have split up the 400 Manager's organization without previous notice or consultation with the Union. Neither is it that plain to the Union's counsel, who too sees the Company's unilateral action in making the split as a precommitment which prevented the parties reaching a "meaningful agreement" at the meetings held subsequent to the split.

(2)

I have treated the facts rather extensively, acknowledgedly because the Company's conduct so closely skirts the edges of the good-faith requirement as to invite an effort to seek what could be done about it under the Act. The observation above is made after making full allowance for the fact that the split of the 400 was economically motivated, and that the operations it transferred out of the 400 to the newly formed 100 were calculated to make the application of Article 27 upon the employees "minimal" in their practical consequences even if their eligibility for jobs was now confined to the reduced dimensions of the two Manager's organizations resulting from the split.

Granting all this, the Company hardly distinguished itself in the manner in which it dealt with the Union concern-

ing the power the Company envisages for itself under a combination of Article 2, its "management rights" clause (*supra*, n. 2), and Article 27, the Movement of Personnel clause. It is a rather awesome one, for the employee's growth, stagnation or survival hinges on the occupational world the Company delimits for the employees by the Manager's organizations it chooses to make. In apparent recognition of such a power when "literally" applied, the Company had in the past softened its impact in various ways. After the first and only prior split in a Manager's organization nearly 11 years earlier (which occurred during the first contract when it emerged from its "pilot" stage), it gave the Union "prior" notice of splits in a mere Assistant Manager's organization at least to the extent of the "courtesy" preceding the effective date, and when after these splits were made and the Union raised objections, the Company, as exemplified by the splits involving the 420-450 Assistant Manager's organization, suspended their implementation under Article 27 for the years that these objections were under consideration.

In contrast, when the Company split up an entire Manager's organization, the first, as stated, in the nearly 11 years before the only preceding one, it gave it no prior notice and left the Union to learn about it through the grapevine. It made the split only 6 months after the execution of the 1969 contract, during the negotiations for which Bosworth told them that no change was "contemplated," even though, as he later admitted to the Union at the meeting on February 18, 1970 and to us at the hearing, he was at that time "aware of this [the split in the 400 organization] being considered." Further, in contrast with the kind of accommodation it had made when there had been the split involving the 420-450 Assistant Manager's organizations, this time it refused to give the employees the single corridor of movement to the end of the 1969 contract, despite their complaint that but for the assurance given them at the negotiations in May of 1969, they would have re-

sisted signing the contract with Article 27 in the "literal" manner he was now advancing, and even thought, since Bosworth was sure the actual consequences of Article 27 on the employees' were "minimal," the grandfathering of the employees for the duration of the contract would not have impaired the Company's economic purpose in making the split,—namely, to insure the efficiency of its supervisory operations.

(3)

However, though equitable consideration are indeed relevant in many of these matters, pitted against them here for purpose of determining whether the Act has been violated is the hard fact of the contract the parties signed. Thus this case involves the balance or "accommodation," referred to by the Board in its decision in *Collyer Insulated*,[19] "between on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process, and on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." (Slip op. p. 15.) While, as there stated, the Board, in evolving its policy concerning when to defer to the arbitral process, has generally struck the balance at the stage where there has been an actual award,[19a] "[i]n those cases in which no award had issued, the Board's guidelines have been less clear." Whatever the prior fluctuations of emphasis concerning where the balance is to be struck when there has been no arbitration award, the Board in *Collyer Insulated* has pronounced the policy now applicable when the parties have a contract containing a grievance-arbitration procedure. It is now

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[19] *Collyer Insulated Wire*, 192 NLRB No. 150.

[19a] Subject, however, to the requirement that the procedures be "fair and the results not repugnant to the Act," citing *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082. See also *Precision Fittings, Inc.*, 141 NLRB 1034.

striking the balance in the manner articulated in *Jos. Schlitz Brewing Company*, 175 NLRB No. 23, where it was stated that

> [W]here . . . the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties

As in *Schlitz* and *Collyer Insulated*, the dispute here would be "well suited to resolution by arbitration," except that instead of a comprehensive arbitration clause as in *Schlitz* and *Collyer Insulated*, the arbitration clause here excludes from its scope "subject matter [which is] related in an manner to the exercise of any of the Company's rights of management." The Company justifies its immunity from an obligation to give the Union prior notification or an opportunity to discuss the split of the 400 Manager's organization on the ground that it is a "management right" under Article 2 (*supra*, n. 2). Since this is not encompassed by the arbitration clause, it would normally be a matter for us to determine. Cf. *Zenith Radio Corp.*, 177 NLRB No. 30. We would then weigh two opposing positions. On the one hand, there is the Company's position that a split in a Manager's organization, being a change in supervisory structure, is an exercise of a management prerogative, here buttressed by the management right clause in the contract, which an employer is free to resort to without a requirement to notify or discuss it with the Union.[20] On the

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[20] Citing, among other cases, *Cessna Aircraft Co.*, 172 NLRB No. 86; *Providence Journal Co.*, 180 NLRB No. 103, *KONO-TV Mission Television Corp.*, 163 NLRB 1005.

other hand, the position of the General Counsel and the Union is that a Manager's organization prescribes the limits of the employee's occupational world and that a split in it narrows its scope for the employee and accordingly changes the employees' conditions of employment, and thus the Company is required under the Act to give the Union prior notice or opportunity to discuss it. In the past, the Company gave the Union that prior opportunity in the form of at least a notification or "courtesy" before the effective date of these splits. The fact that the Union made no protest against these splits prior to their being instituted was not, as the Company's claim it was, a waiver by the Union of its right to be given that prior notice.[21] In that connection the General Counsel and the Union bear down heavily on the doctrine in *Fibreboard*,[22] involving the partially analogous conduct of an employer in subcontracting work. These it was held that:

> [C]ontracting out work "*albeit for economic reasons,* is a matter within the statutory phrase 'other conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act." (Emphasis added.)

However, the Company points to a series of cases which qualify the *Fibreboard* doctrine. These are to the effect that an employer may, without violating its bargaining obligation of the Act, subcontract its operations without previously notifying the union, assuming certain other

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[21] A right under the Act is not deemed waived unless clearly and unequivocally expressed. *The Timken Roller Bearing Co.*, 136 NLRB 15, enfd. 325 F. 2d 746 (C.A. 6). A union's unsuccessful prior efforts to include in the contract a statement of its statutory right to bargain about a change in working conditions is not evidence of a waiver to advance notice to bargain about such a change. *Cloverleaf Div. of Adams Dairy Co.*, 147 NLRB 1410, 1413, citing *Timken, supra.* See also *T.T.P. Corp.*, 190 NLRB No. 48.

[22] *Fibreboard Paper Products, Inc.* v. *N.L.R.B.*, 379 U.S. 203.

factors, including also the fact that the subcontracting has not had an actual "significant impact on unit employees' job interests" as distinguished from their potential ones.[23] In the General Counsel's and Union's briefs, I find no mention of these cases, or so far as I can see, no efforts to distinguish them on the basis above mentioned.[24]

This matter aside, a failure to give prior notice is not necessarily fatal if the Union is otherwise given the opportunity to discuss a change before its implementation. Cf. *Hartmann Luggage Co.*, 145 NLRB 1572; *Holiday Inn Central*, 181 NLRB No. 16 (TXD, p. 8). The Company points to the fact that when the parties met on December 1 and again on December 8, 1969, no employee had felt the impact of the split, and that by proposing a 3-months

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[23] *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574; applied in *Allied Chemical Corp.*, 151 NLRB 718, aff'd. sub nom *District 50 UMW* v. *N.L.R.B.*, 358 F. 2d 778 (C.A. 4); *American Oil Co.*, 151 NLRB 421; *Shell Oil Co.*, 149 NLRB 305. Cf. *Cities Service Oil Co.*, 158 NLRB 1204.

[24] The General Counsel does cite *T.T.P. Corp., supra*, n. 21, which I have included under the general proposition that a waiver of a right under the Act must be clearly and unequivocally expressed before being considered such. There the employer unilaterally terminated its contributions to a retirement plan which the employer had voluntarily instituted 5 years earlier. It was held that the empoyee's silence about it when it was instituted did not constitute a waiver of the right to bargain about ater changes in it. The General Counsel attaches to that case still another significance. It relies on the fact that a change in a retirement plan is a change in conditions of employment even though the change does not immediately deprive employees of its benefits and that the employees' later entitlement to these benefits involves future contingencies. By parity of reasoning the General Counsel claims that the fact that a split in a Manager's organization does not immeditaely visit its impact on the employees and hinges upon future events, does not mean that employees' terms of employment have not thereby been changed by a split in a Manager's organization. Without laboring the matter, the two are not quite analogous. The *T.T.P. Corp.* case does not deal with the *Fibreboard* doctrine or with the cases that qualify it.

suspension of implementation of the split and meeting with the Union it gave it full opportunity to discuss both its action in making it and the length of time in which the employees should be "grandfathered" from the effects of the split under Article 27 before taking effect. As it turned out, the effects of the split were "minimal," as indeed Tom Hickman, the IBEW International Representative, stated at the meetings on February 18, 1970 and again on November 19, 1970. The thrust of these prolonged discussions was basically whether, as the Union claimed, the employees should have a single corridor of movement for the duration of the contract on the ground that the execution of the contract fixed their corridor of movement as of the time of the execution of the contract, or as the Company contended, whether the split in the 400 Manager's organization created two separate corridors of movement, the decision resting with the Company concerning how long if at all to continue the employees under a single corridor of movement. Although at the hearing, the Union's witnesses at first vacillated between whether they were challenging the Company's right to make the split, they ultimately agreed, as did also union counsel at the hearing, that the nub of the dispute was whether the employees should be "grandfathered" from the "literal" language of Article 27 for the duration of the contract. The fact that the Union does not now challenge the Company's action of having split the Manager's organization is again not to be construed as a waiver of its right in the future to challenge a split in a Manager's organization which is shown to affect employees' jobs. All that is meant here is that on the facts of this case, the parties dispute turned on whether regardless of the split here made, the Company should have nevertheless continued the employees under a single corridor of movement for the duration of the contract or whether it had the option to decide upon the extent, if at all, to which the employees were to be grandfathered from the effects of Article 27 in consequence of the split. Since the Company now acquiesces in what the Union had itself

originally urged and since the basic point of the discussion was a dispute over the interpretation of Article 27 as expressed by these two opposing positions, it would seem fair to say that an arbitral decision concerning these opposing positions should terminate this particular controversy in the manner indicated in *Collyer Insulating*. In that respect, we note the following additional observation by the Board in the *Collyer* case that (slip op. p. 20):

> [T]he courts have long recognized that an industrial relation dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. Where the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function.

If the arbitration award should favor the Union, then it would be entitled to full redress on behalf of the few employees who specifically felt the impact of the split in that they would have gotten (as had Beardsley) jobs to which they have been entitled but for the split. It may well be that the Union feels it does not have sufficient information on which to determine what grievances to advance in consequence of the split, and whether to press them to arbitration. The Company points to Article 34 of the contract under which the Union is entitled to information relevant to these matters. During the hearing company counsel stated it provided the Union with all relevant information it sought, including, for example, the information concerning the work experience and qualifications of the hundreds of employees in the 400 at grade 34 that had more seniority than the 10 employees in the 100 who had been promoted to grade 35 "selector" positions. Union counsel stated it did not have "all" such information, but did not specify what items were missing. Until it does, we are in no position to apply the doctrine in *N.L.R.B.* v. *Acme Industrial Products,* 385 U.S. 432, which requires the em-

ployer to supply the union with information needed to enable it to perform its representative function of deciding which grievances to press or to pursue to arbitration. When and as the Union determines which relevant information the Company is refusing to supply to it, the matter can be considered in connection with the retention of jurisdiction comparable to the one reserved in the remedy in the *Collyer Insulated* case.

CONCLUSION OF LAW

Accordingly, on the basis of all the foregoing and the entire record, I conclude that it would effectuate the policies of the Act if, "without prejudice to any party and without deciding the merits of this controversy," the parties are relegated to the grievance-arbitration procedures of the contract.

REMEDY

Applying the language in *Collyer Insulated*—

> [J]urisdiction is [hereby retained] over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration or (b) the grievance or abritration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

In specific amplification of item (a), the retention of jurisdiction includes the right of the General Counsel or the Union to make an appropriate and timely motion to require the Company to supply such additional information, requested by the Union and refused by the Company, which the Union needs in order to perform its representative function within the principle of the *Acme Industrial*

case, of determining which grievances to advance or to pursue to arbitration.

On the basis of the entire record, I accordingly issue the following:

RECOMMENDED ORDER

That the complaint herein is dismissed; provided, however, that:

Jurisdiction of the proceeding is hereby retained for the purposes stated in the Remedy.

Dated at Washington, D.C.

/s/ A. NORMAN SOMERS
A. Norman Somers
Trial Examiner

APPENDIX A

ARTICLE 27—MOVEMENT OF PERSONNEL

1. General

* * *

1.2 TERM OF EMPLOYMENT shall be given most weight in the selection of an employee to fill a vacancy when two or more employees under consideration possess substantially the same qualifications needed for such vacancy.

1.3 Qualifications as used in this Article shall be determined by the Company based on the employee's experience, demonstrated productive efficiency, skill or ability and conduct on the job.

1.4 If the Union objects to any move made in accordance with the provisions of this Article within ten (10) days after the effective date of such move, the matter may be processed in accordance with ARTICLE 9, GRIEVANCE PROCEDURE, and ARTICLE 10, ARBITRATION, provided that in any such case the authority of the Arbitrator

shall be limited to a determination as to whether the Company's judgment has been unreasonably exercised.

2. Filling Job Vacancies

2.1 When a vacancy occurs, employees of the Company who have qualifications for the vacancy will be considered in successive steps in the following order until the vacancy is filled:

* * *

(c) Graded employees in successively lower grades from within (1) the Assistant Manager's organization having the vacancy for vacancies in grade 34 and lower, or (2) the Manager's organization having the vacancy for vacancies in grade 35 and higher or in the JOURNEYMAN TRADES OCCUPATIONS or JOURNEYMEN from within the Manager's organization having the vacancy.

2.2 Employees may also be considered as candidates for lateral transfer or upgrading to a vacancy in the order of their TERM OF EMPLOYMENT provided their supervisors have recommended them for consideration beyond that provided by the provisions of Paragraph 2.1(c) above. The Company agrees that in order to afford opportunities for advancement to longer service employees where such opportunities are not available under the application of the provisions of Paragraph 2.1(c) above, every effort will be made to apply uniformly this recommendation procedure.

* * *

3. Effect of Lack of Work

3.1 When lack of work necessitates decreasing the working force, employees shall be selected as surplus in the inverse order of their TERM OF EMPLOYMENT from the occupation; grade, if applicable; and Department Chief's organization affected; except that the Company may exempt from such selection certain employees on the basis that their skill, training or experience is necessary for

the efficient operation of the business. An employee selected as surplus or an employee who becomes surplus by displacement shall be considered for placement in the order of the following successive steps:

3.11 Graded Employees

* * *

(b) Displace in his same grade in his own Manager's organization another employee who has the shortest TERM OF EMPLOYMENT, provided the surplus employee is considered by reason of his previous experience to be able to perform the assignment efficiently within a limited training period of two (2) weeks, and further, provided the surplus employee has at least three (3) months more TERM OF EMPLOYMENT than the employee to be displaced. If the employee is not thus placed, then

(c) In the next lower grade in accordance with (a) and then (b) above and in the same manner in successively lower grades.

(d) A surplus employee who cannot be placed as provided in Paragraphs 3.1 (a), (b) or (c) above, shall be considered outside his Manager's organization for displacement on a job, first in the same grade and failing that in successively lower grades, which he has performed satisfactorily, provided the surplus employee has at least three (3) months more TERM OF EMPLOYMENT than the employees to be displaced.

199 NLRB No. 49

D—6658
Shreveport, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WESTERN ELECTRIC, INC.
and
E. J. BARBER, an Individual
and
J. D. BRAGGS, an Individual
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 2188, AFL-CIO

Cases 15—CA—4007-1, 2; 4053

DECISION AND ORDER

On January 27, 1972, Trial Examiner Maurice S. Bush issued the attached Decision in this proceeding. Thereafter the Respondent filed exceptions and a supporting brief. The Charging Parties filed limited exceptions and an answering brief. The General Counsel filed limited exceptions, a brief in support thereof, and a reply brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] The Respondent filed a motion to reopen the record to take additional evidence with respect to the issue of deferral to arbitration. The General Counsel's reply brief includes an opposition to the Respondent's motion. In our opinion the record herein adequately presents the deferral to arbitration issue and the parties' positions thereon. Accordingly, the Respondent's motion is hereby denied.

The Charging Parties' request for oral argument is likewise hereby denied since in our opinion the record in this proceeding, including the exceptions and briefs, adequately presents the issues and positions of the parties.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions to the extent consistent herewith.

The Trial Examiner found the Respondent violated Section 8(a)(5) and (1) by unilaterally altering the plantwide movement of personnel provided for in article 28 of the parties' collective-bargaining agreement,[2] and thereby caused a change in the established working conditions of the employees in the unit. In so finding, the Trial Examiner rejected the Respondent's claim that the dispute should be resolved by an arbitrator under the contract's grievance procedure.

The collective-bargaining agreement contains a grievance and arbitration procedure culminating in final and binding arbitration,[3] and the Respondent and Union have agreed to submit disputes over the meaning and application of the collective-bargaining agreement to that procedure. This case involves alleged unilateral changes in the existing movement-of-personnel provisions of the collective-bargaining agreement and centers on the meaning of

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[2] The contract does not provide for plantwide movement of personnel as the Trial Examiner implies throughout his Decision. Rather, it provides for movement of personnel within the manager's organization with respect to labor grades 35 and up. The essence of the dispute herein is what was intended when movement of personnel was limited by contract to the manager's organization.

[3] The Trial Examiner found that the present controversy should not be deferred to arbitration because there is no obligation to submit contract disputes to arbitration and the contract does not provide for final and binding arbitration with respect to the dispute involved herein. We disagree. It is clear to us from our examination of the contract that a dispute is arbitrable, upon request, after the exhaustion of the earlier steps of the grievance procedure, and the use of the term "may" merely refers to the option to request or not request arbitration. Cf. *Tulsa-Whisenhunt Funeral Homes, Inc.*, 195 NLRB No. 20, where *ad hoc* agreement of both parties was required before arbitration could be invoked.

those provisions and whether Respondent has gone beyond them. Thus, the dispute here involved involves the interpretation of a provision of the collective-bargaining agreement [4] and this is a matter which the parties have voluntarily agreed to resolve by means of the grievance procedure.[5]

For these reasons, we shall not consider the merits of the dispute at this time but shall defer to the parties' grievance procedure.[6]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the complaint be, and it hereby is, dismissed; provided, however, that:

Jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision, either

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[4] The Trial Examiner concedes the issue is solely one of contract interpretation (third full paragraph of the Trial Examiner's Decision).

[5] In fact, this matter has been the subject of two grievances which were not taken to arbitration by the Union as it presumably chose to file the instant charges and a contract action in Federal district court. Moreover, on February 19, 1971, the Respondent at the Union's request proposed that the precise issue involved herein be referred to an arbitrator; the Union without explication declined to agree to arbitration.

[6] *Wrought Washer Manufacturing Co.*, 197 NLRB No. 14; *Coppus Engineering Corporation*, 195 NLRB No. 113; *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB No. 150. See also *Western Electric, Inc.*, 199 NLRB 45, decided this day, in which the Board adopted Trial Examiner A. Norman Somers' recommendation that it defer a similar contract dispute to arbitration.

been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular, or have reached a result which is repugnant to the Act.

Dated, Washington, D. C.

Ralph E. Kennedy, Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

For the reasons set forth in my dissent in *Collyer Insulated Wire*, 192 NLRB No. 150, I think the Board neither can nor should require the issue of violation of Section 8(a)(5) of the Act to be determined by an arbitrator instead of this Board. Therefore, I would proceed to the merits of the case.

Without passing on the merits of the case, except generally, one observation appears appropriate herein. The Respondent contends and the Trial Examiner apparently concedes that the issue here is one of contract interpretion. Assuming this case is one of pure contract interpretation, solely from a practical point of view we should dismiss it on the merits and be done with it.[7] All of the parties including the Board have already expended great amounts of time and money on this case; yet rather than decide the case, we send the parties away empty handed to expend more time and money on an arbitration proceeding which in itself may not be final in view of the Board's retention of jurisdiction for limited purposes. Moreover, we should not overlook the possible lengthy disruption of what appears to be an otherwise stable

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[7] *Vickers, Incorporated*, 153 NLRB 561; *National Dairy Products Corporation, Detroit Creamery Division*, 126 NLRB 434.

bargaining relationship that may result until this issue is resolved. I emphasize that this is a purely practical and secondary consideration; my primary objection to the Board's abdication of its statutory authority is set forth in my dissent in *Collyer*.

Dated, Washington, D.C.

JOHN H. FANNING, Member
NATIONAL LABOR RELATIONS BOARD

TXD—29—72
Shreveport, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

WESTERN ELECTRIC, INC.
Case 15—CA—4007-1

and

E. J. BARBER, an Individual

and

J. D. BRAGGS, an Individual
Case 15—CA—4007-2

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION No. 2188, AFL-CIO
Case 15—CA—4053

Harry L. Hopkins, Esq., of New Orleans, La., for the General Counsel.

Lawrence M. Joseph and *Michael Hertzberg, Esqs.*, of New York, N. Y., for Respondent.

James A. Burnett, Esq. (*Burnett, Harrison & Sutton*), of Shreveport, La., for the Charging Parties.

The Examiner's Decision

STATEMENT OF THE CASE AND ISSUES

MAURICE S. BUSH, Trial Examiner: Respondent Western Electric, Inc., has operated its Shreveport, Louisiana, plant under successive collective-bargaining agreements with the above-named Union since 1966. From February 22, 1966, when the Company entered into its first contract with the Union, the employees in appropriate unit here involved were under the management of a single overall company manager in charge of manufacturing and his assistant managers except for temporary brief periods in 1970 when there were two managers as shown below. During that 4-year period, the up to 3,300 employees in the unit had plantwide movement of personnel in such matters as grade promotions, downgrading, lateral transfers, and bumping rights in layoffs.

In the latter part of 1970 during the midterm of the then outstanding collective-bargaining agreement, the Company took certain actions affecting the movement of personnel as shown below. On October 1, 1970, after notice to the Union, the Respondent divided the appropriate unit for management purposes into two sections and placed one section under the management of the man who had theretofore been manager of the entire unit and the other section under another manager, each with their own respective assistant managers. This division of the unit into two sections under separate managers did not immediately affect the movement of personnel which as before remained plantwide. However, on November 3, 1970, the Company by unilateral action, after unsuccessful bargaining with the Union and against its protest, restricted the movement of personnel of the employees in the unit to that within their own manager's supervisory jurisdiction. The effect of this change was that the employees in the unit in upper grades no longer had plantwide movement of personnel as formerly enjoyed. Thus, as stated in Respondent's brief, from and after November 3, 1970,

". . . any promotion in the higher grades . . . and bumping were restricted to the employee's own manager's organization. . . ." After the change, a senior employee in point of service in one of the two manager's organizations could lose his job in a layoff while a junior employee in the other manager's organization would be retained.

The principal issue in the case is whether the Respondent by its above-described unilateral action of November 3, 1970, altered the provisions of the collective-bargaining agreement between the Respondent and the Union by changing the established working conditions of the employees in the unit in violation of Section 8(a)(1) and (5) of the National Labor Relations Act as alleged in the complaint. This in turn involves an interpretation of the rights of the Company and its unit employees under the collective-bargaining agreement with respect to "Movement of Personnel" as set forth in Article 28 of the Agreement.[1] While General Counsel admits the Company's right to add new manager's organizations for the management of the unit as it sees fit under the management clause of the contract, he and the Charging Parties contend that the "Movement of Personnel" provision of the agreement *as reflected by the intent of the contracting parties and by past history* required the Company to continue the *status quo* of the plantwide movement of personnel *for the duration of the contract* and that no restrictions on the free plantwide "Movement of Personnel" as theretofore enjoyed by the employees in the unit could be made in midterm of the agreement. The Company, on the other hand, contends that the "Movement of Personnel" section of the collective-bargaining agreement *by its very terms* gives the Company the right to *unilaterally* restrict movement of personnel *during midterm of the contract* to each separate manager's organization the Company sees fit to create within the unit during the life of the contract.

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[1] The collective-bargaining agreement is reflected in Joint Exh. 1. It consists of 69 pages and about an equal number of pages of related appendixes and exhibits.

However, Respondent s initial defense to the complaint herein is that the contractual dispute as set forth above should be referred to the "final and binding arbitration" provisions of the collection-bargaining agreement and that therefore the complaint should be dismissed without a determination of the contractual issue by the Trial Examiner. This issue will be given first consideration below although accorded secondary space by Respondent in its brief.

The consolidated complaint herein was issued on March 8, 1971, pursuant to charges filed in Case Nos. 15-CA-4007-1 and 15-CA-4007-2 on January 14, 1971, and pursuant to a charge filed in Case No. 15-CA-4053 on March 8, 1971.

The case was tried before the Trial Examiner on May 18 and 19, 1971, at Shreveport, Louisiana. Briefs filed by counsel for the General Counsel and the Respondent on July 19, 1971, have been carefully reviewed and considered. Similarly, the supplement to Respondent's brief filed on September 7, 1971, calling attention to the Board's recent decision in *Collyer Insulated Wire,* 192 NLRB No. 150, on the matter of deferrals to arbitration, has also been considered.

Upon the entire record and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. The Business of the Respondent

The Company is engaged at its Shreveport, Louisiana, plant (known as "Shreveport Works") in the business of manufacturing electrical components for the communication industry. In the course and conduct of its business the Company's Shreveport plant annually purchases goods valued in excess of $50,000 directly from suppliers in states other than the State of Louisiana. Similarly, in the course of its business, the Company's Shreveport plant

annually sells and ships goods valued in excess of $50,000 directly from its said plant to enterprises located in states other than Louisiana. The Company at all times here material has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Findings on Issue as to Deferral to Arbitration Procedure

As heretofore noted, the Company contends that the question of whether it has the right to restrict movement of personnel at its Shreveport plant midterm under the collective-bargaining agreement from the former plantwide movement to less than plantwide movement as that term relates to upgrading, downgrading, lateral transfers, and layoffs should be deferred to the "Final and Binding Arbitration Provisions of the Collective-Bargaining Agreement."

The general provisions for arbitration of disputes between the Company and the Union are set forth in Article 11 of the collective-bargaining agreement under the heading of "Arbitration," but the authority of an arbitrator under Article 11 to render a final decision under Article 11 is expressly qualified and sharply limited by Article 28 of the agreement under the heading of "Movement of Personnel" when the issue involved is movement of personnel.

Article 11 under paragraph 1 provides that, "And dispute arising between the Union and the Company with respect to the interpretation of any provision of this agreement . . . *may be* referred . . . to an Arbitrator. . . ." (Emphasis supplied.) Article 11 under paragraph 7 further provides that, "The decision of the Arbitrator . . . shall be final. . . ." But Article 28 on the subject of "Movement of Personnel" under paragraph 1.6 restricts the authority of the arbitrator to issue a decision on any question involving movement of personnel as follows, ". . . in any such case the authority of the ARBITRATOR

shall be limited to a determination as to whether the COMPANY'S judgment has been unreasonably exercised." (Emphasis supplied.)

By letter dated February 12, 1971, the Union through counsel advised the Company that it was "interested in exploring the possibilities of arbitrating" the involved issue, but as it was not sure what the Company deemed the issue to be, asked for a formulation of the issue as the Company saw it, but reserved the right to withdraw from arbitration efforts "in the event that we do not agree to what should be arbitrated. . . ." (Respondent's Exh. 10.)

Under letter dated February 19, 1971, the Company in reply through counsel proposed the following issue for arbitration:

> Whether Article 28 (Movement of Personnel) of the Collective Bargaining Agreement effective July 24, 1969, requires the company to permit movement of personnel (upgrading, downgrading, lateral transfer) between the two managers' organizations (the 200 Organization and the 500 Organization) after the date the company reorganized its structure to provide for two managers' organizations rather than one." (Respondent's Exh. 11.)

The Union under letter of February 26, 1971, apparently because it was not satisfied with the issue as stated, declined through counsel to agree to arbitration, and elected to stand by a lawsuit it had started to block the Company from curtailing the plantwide movement of personnel that the employees in the unit had theretofore enjoyed. (Respondent's Exh. 12.)

Discussion and Conclusions

The difficulty with Respondent's contention that its asserted contract right to unilaterally curtail pre-existing movements of personnel should be referred to the "Final and Binding Arbitration Provisions of the Collective-Bar-

gaining Agreement" is that the above findings of fact show that there are *no* final and binding arbitration provisions in the collective-bargaining agreement on issues *involving movement* of personnel. The only determination that an arbitrator can make on such an issue is on "whether the Company's judgment has been unreasonably exercised." That would not be a final determination because the "finality" feature of the arbitrator's decision under the general arbitration clause of the agreement, Article 11, is superseded by the language of Article 28 which states expressly that the "authority" of the arbitrator *"shall be limited"* to a mere determination of whether the Company's judgment on matters of movement of personnel has been unreasonably exercised. Moreover, such a determination by an arbitrator, in the Trial Examiner's opinion, would *not* be "binding" upon the parties, or even upon the Company, not only because it is not a final decision but also because it is a mere opinion by an arbitrator and not a genuine determination of whether the unfair labor practice alleged in the complaint has been committed and consequently cannot put the alleged unfair labor practice issue finally at rest in a manner sufficient to effectuate the policies of the Board. *C & S Industries, Inc.*, 158 NLRB 454.

Another difficulty with Respondent's contention that the contract dispute should be referred to arbitration is that there is no obligatory requirement in the collective-bargaining agreement for such referral. The agreement provides machinery for arbitration but the use of such machinery is optional to the parties as the agreement merely states that the parties "may" refer disputes as to the interpretation of the agreement to an arbitrator. Under the collective-bargaining agreement, it is not enough that one side to the controversy may desire referral to arbitration; under the agreement *both* parties must consent to the arbitration provisions before such provisions can come into play.

The Board in 1955 in *Spielberg Mfg. Co.*, 112 NLRB 1080, set forth the criteria for deferral to arbitration awards. One of these is that all parties agree to be bound. In *International Harvester Co.*, 138 NLRB 923, enfd. *sub nom. Ramsey* v. *N.L.R.B.*, 327 F.2d 784 (C.A. 7), cert. denied 377 U.S. 1003, the Board stated ". . . that collective-bargaining agreements *that provide for final and binding arbitration* of . . . disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective. . . ." (Emphasis supplied.) Although that decision favors referrals to arbitration, it plainly indicates that there can be no such deferral unless the collective-bargaining agreement provides for *obligatory* final and binding arbitration. The collective-bargaining agreement here involved as shown has no such obligatory requirement for the submission of contract disputes to arbitration. Accordingly, it is found that under the holding in the *Spielberg* case that the present controversy is not subject to deferral for arbitration because the parties have not agreed to be bound by arbitration of the controversy.

In a letter supplement to its brief, Respondent calls attention to the Board's recent decision in *Collyer Insulated Wire*, 192 NLRB No. 150, which it asserts is relevant to the instant proceeding. In *Collyer* the Board reiterated and perhaps broadened its policy of deferring to arbitration procedure, but here again the Board made it abundantly clear that there can be no deferral to arbitration unless the collective-bargaining agreement provides for mandatory arbitration of contract disputes. This appears from the following language of the Board in the *Collyer* decision, ". . . the breadth of the arbitration provision makes clear that the parties *intended* to make the grievance and arbitration machinery the *exclusive* forum for resolving contract disputes." (Emphasis supplied.) It is this complete absence of any obligatory provision in the collective-bargaining agreement here under consideration

for reference to arbitration procedure that must necessarily disqualify Respondent's request for referral to arbitration and dismissal of the complaint.

Respondent's motion for deferral and dismissal of the complaint is denied.

III. Unfair Labor Practices

As heretofore noted the Company contends that the collective-bargaining agreement by its terms gives it the right midterm to unilaterally curtail the plant's pre-existing plantwide movement of personnel whereas General Counsel contends that the contract by the intent of the parties and actual past practice requires bargaining and consent by the Union before the Company can initiate any contraction of the existing plantwide movement of personnel during the life of the contract. The Union's greatest concern is that in a layoff, the Company's midterm unilateral abridgment of the pre-existing plantwide movement of personnel could result in the layoff of a senior employee in one of the Company's newly divided management sections of the unit while a junior employee in the other section would be retained. Respondent's basic concern is to retain what it deems to be its managerial prerogative and right under the text of this contract to curtail midterm as it sees fit, the past plantwide movement of personnel.

Much of the basic and undisputed facts concerning the principal issue of whether the Company is in violation of Section 8(a)(5) and (1) of the Act by reason of its midterm unilateral action of November 3, 1970, in restricting pre-existing movements of personnel has been set forth in the opening paragraphs of this decision for the purpose of furnishing the background necessary for a ready understanding of the issues in the case. A more complete statement of the facts is set forth below.

Western Electric has a total of 21 manufacturing plants throughout the United States. The Company's Shreveport

plant, here involved and another at Indianapolis, manufacture all of the telephone equipment used in the Bell Telephone System. The Indianapolis plant manufactures the single line telephone that is used in the home; one of its supervisors, as will be hereinafter noted, became temporarily involved in the supervision of part of the appropriate unit in the present case. The Shreveport plant manufactures multiline desk sets for office and industrial use and wall and coin telephones; it also manufactures innumerable components for telephones, such as key switches, connector wires, and piece parts for telephone repair. About 65 percent of the Shreveport production is the manufacture of telephones and the balance consists of component parts for telephones.

Western Electric's Shreveport Works plant began operations in May 1965 at a pilot plant and moved to its present permanent quarters in November 1967. The Shreveport Works has been operated under successive collective-bargaining agreements with the Union since February 22, 1966. The bargaining unit involved in these contracts is the only unit in the plant represented by a union. The appropriate unit here involved consists of all the hourly-rated production and maintenance employees in the plant's manufacturing division, excluding office and plant clerical employees, professional employees, guards and supervisors as defined in the Act.

The collective-bargaining agreement in effect at the time of the trial herein is the fourth such contract between the Company and the Union. It became effective July 24, 1969, and was scheduled to expire on July 23, 1971. The Company unilaterally made the change in movement of personnel the Union complains of in midterm of the contract.

By stipulation, it is established that all of the three predecessor collective-bargaining agreements between the Company and the Union contained paragraphs virtually identical with Article 11 on "Management of Business" and Article 28 on "Movement of Personnel" as contained in the current agreement here under consideration.

The record further shows that such Articles 11 and 28 are standard form provisions in virtually all of the collective-bargaining contracts of the Company throughout the country at its other plant locations. This finding is based in large part upon the testimony of Respondent's Shreveport plant Manager of Industrial and Labor Relations, Donald W. Corliss who testified extensively herein.[2] It is also based on the Examiner's official notice of the allegations of a complaint in Case No. 17-CA-4233 involving one of the Company's plants in Omaha, Nebraska. From a perusal of the allegations of that complaint it appears that the collective-bargaining agreement in the Omaha plant case also has an article (numbered 27) therein substantially the same or identical with Article 28 of the agreement in the instant case and that the central issue in the Omaha case, as here, is the right of the Company under its contract with the Omaha local to unilaterally restrict movement of personnel in midterm of the collective-bargaining agreement.[3]

Article 2 of the collective-bargaining agreement here involved on "Management of Business" gives the Company the right to direct the work for and operations of the Shreveport plant as follows:

> The right to manage the Plant and to direct the work forces and operations of the Plant, subject to the limitation of this Agreement, is exclusively vested in, and retained by, the COMPANY.

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[2] There have been only two witnesses in this proceeding, the aforementioned Mr. Corliss for the Company and Melvin W. Horton, a unit employee of the Company and vice president of the Local, who testified in behalf of General Counsel.

[3] The findings as to the allegations of the complaint in Case No. 17-CA-4233 are based strictly on the allegations thereof themselves. The hearing in that case before another Trial Examiner has been completed and is pending decision. The present Examiner has no knowledge of the facts in that case as developed at the hearing thereof before another Examiner. The decision in the instant case will be issued without reference to that in the Omaha case, should that decision precede the decision herein.

The controversial Article 28 on the "Movement of Personnel" in pertinent portions reads as follows:

ARTICLE 28—MOVEMENT OF PERSONNEL

1. *General*

1.1 All adjustments to the working force through upgrading, downgrading, or lateral transfer, or increases or decreases in the working force in accordance with the provisions of this Article shall be initiated and made by the COMPANY.

1. TERM OF EMPLOYMENT shall be given most weight in the selection of an employee to fill a vacancy when two or more employees under consideration possess substantially the same qualifications needed for such vacancy.

1.3 Qualifications as used in this Article shall be determined by the COMPANY based on the employee's experience, demonstrated productive efficiency, skill or ability and conduct on the job.

• • •

1.6 If the UNION objects to any move made in accordance with the provisions of this Article within ten (10) days after the effective date of such move, the matter may be processed in accordance with ARTICLE 10, GRIEVANCE PROCEDURE, and ARTICLE II—ARBITRATION, provided that in any such case the authority of the ARBITRATOR shall be limited to a determination as to whether the COMPANY'S judgment has been unreasonably exercised.

2. *Filling Job Vacancies*

2.1 When a vacancy occurs, employees of the COMPANY who have qualifications for the vacancy will be considered in successive steps in the following order until the vacancy is filled:

• • •

(c) Graded employees in successively lower grades from within (1) the Assistant Manager's organization having the job vacancy for vacancies in grade 34 and lower, or (2) the Manager's organization having the vacancy for vacancies in grade 35 and higher or in the JOURNEYMAN TRADES OCCUPATIONS or JOURNEYMEN from within the Manager's organization having the vacancy.

• • •

3. *Effect of lack of Work*

3.1 When lack of work necessitates decreasing the working force, employees shall be selected as surplus in the inverse order of their TERM OF EMPLOYMENT from the occupation; grade, if applicable; and Department Chief's organization affected, . . . An employee selected as surplus or an employee who becomes surplus by displacement shall be considered for placement in the order of the following successive steps:

3.11 *Graded Employee*

• • •

(b) Displace in his same grade in his own Manager's organization another employee who has the shortest TERM OF EMPLOYMENT, provided the surplus employee is considered by reason of his previous experience to be able to perform the assignment efficiently within a limited training period of two weeks, and further, provided the surplus employee has at least three (3) months more TERM OF EMPLOYMENT than the employee to be displaced. If the employee is not thus placed, then

(c) In the next lower grade in accordance with (a) and then (b) above and in the same manner in successively lower grades.

Summarized, the Company has the right (under par. 1 of Article 28) "to initiate the adjustment of the work-

force," to wit, the unit here involved, through "upgrading, downgrading, or lateral transfer,[4] or increase or decreases," subject, however, to union objections (under par. 1.6 of Article 28) which may be processed through grievance and arbitration procedures.

In such adjustments to the working force of the appropriate unit, *term of service must be given most weight* (under par. 1.2 of Article 28) in the selection of an employee to fill a vacancy when two or more employees under consideration possess subsantially the same qualifications needed for such job vacancy. The Examiner finds that the requirement that *superior term of service* be given the *most weight* when two or more equally qualified employees are considered for a vacancy is a *basic seniority provision* in the collective-bargaining agreement, notwithstanding the fact that between two or more candidates of equal seniority but of unequal qualification the Company has the right to choose the employee with the superior experience, productive efficiency, skill or ability and conduct on the job for the vacancy.[5] *Laclede Gas Company*, 173 NLRB 243.

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[4] A "lateral" transfer is shown by the record to be a transfer of an employee from one job to another job assignment without a change of grade or, put another way, at the same rate of pay.

[5] Respondent's contention that Article 28 on "Movement of Personnel" "is not a seniority provision" is wholly without merit. It is based on the argument that the Company under the contract can pick and chose the better qualified man for a vacancy from two or more employees of equal terms of service. However, the Company concedes in its brief, that, ". . . where the qualifications of two or more employees are substantially equal . . . seniority comes into the picture for promotions." This is an admission that Article 28 is essentially a seniority provision. Mr. Corliss, Respondent's manager of Industrial Labor Relations, testified that "We had seniority, the organization being a single manager's organization." The Examiner is of the opinion that the collective-bargaining agreement here under consideration would give the Company the right to select the best qualified man between two or more men of equal service *even* if the agreement was completely silent on the Company's right of selection under such circumstances.

Further summarizing, Article 28 provides for the filling of job vacancies in higher grades (promotions) *based on seniority,* provided the employee has the qualifications, as follows:

1. For promotions "within an *Assistant Manager's Organization"* to Grades 34 or lower. (Article 28 par. 2.1 (c) (1).) (Emphasis supplied.)

2. For promotions in *"the Manager's Organization"* to Grade 35 and higher. (Article 28 at par. 2.1 (c) (2).) (Emphasis supplied.)

Further summarizing, Article 28 provides that in the event of layoffs due to lack of work, the layoffs shall likewise be based on "Term of Employment" which is another way of saying "seniority." The Article designates such candidates for layoffs as "surplus" employees and gives senior surplus employees successive bumping rights on junior surplus employees *"in his own Manager' organization."* (Article 28, par. 3.11 (b).) (Emphasis supplied.)

As noted, Article 28 employs the phrases, "the Assistant Manager's Organization," "the Manager's organization," and "his (employee's) own Manager's organization." There is a clear distinction between a "Manager's Organization" and "Assistant Manager's Organization." A "Manager's Organization" is a reference to a group of employees who work under a designated overall manager or supervisor. An "Assistant Manager's Organization" is a group of employees *within a Manager's organization* who work under the supervision of an assistant manager to the Manager.

From February 26, 1966 until October 1, 1970, the employees in the appropriate unit consisting of all of the plant's production and maintenance personnel, worked under a *single* manager or supervisor. During the whole of that period the *entire unit* was called and known as the

"200 Manager's Organization" under company nomenclature.[8] That period embraced three successive collective-bargaining agreements and most of the term of the fourth successive bargaining agreement between the Union and the Company here under consideration.

At all times here pertinent the manager or supervisor of the "200 Manager's Organization," to wit, the manufacturing department, was G. Lee. There are a number of coordinate managers at the plant of other groups of employees in other departments, but Lee's "200 Organization" was the only organized unit in the plant as well as the largest unit in terms of numbers of employees. Lee in turn has a number of assistant managers working under him who under company nomenclature as shown in the noted footnote also bear arbitrary number identifications such as the "200 Assistant Manager" in charge of production control, the "250 Assistant Manager" in charge of sub and final assemblies of telephone sets, etc.

In March of 1970, the Company temporarily split the original "200 Manager's Organization" into two sections, one of which retained the title of "200 Manager's Organization." Each was placed under a separate manager of coordinate authority. The "500 Manager's Organization" was formed as a new *temporary* management organization to help solve some production problems the Company was having in its coin telephone manufacturing operations such as large back orders, extensive overtime requirements, and poor quality. The employee staff of the new temporary "500 Manager's Organization" was formed by transfers of the coin telephone production employees from the original "200 Manager's Organization" and by transfers of the employees plant's engineering department

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[8] The figure "200" is purely an arbitrary designation and has no reference to the number of employees in the Manager's organization. This is also true of all other numbers that appear in front of other Manager's or Assistant Manager's organizations.

known as the "300 Manager Organization." The employees transferred from the latter were and are nonbargaining employees.

After the split of the original "200 Manager's Organization" into two management groups, Mr. Lee remained manager of the truncated "200 Manager's Organization" and a Mr. Todd, a manager of the Company's aforementioned only other telephone manufacturing plant at Indianapolis, became temporary manager of the new temporary "500 Manager's Organization."

Prior to the split, the Company gave the Union advance notice of its intentions to temporarily split the appropriate unit for management purposes into two management groups as above described and gave the Union the assurances it wanted that the split would not affect the existing plantwide "Movement of Personnel" or, in other words, that the unit employees would continue to have plantwide movement of personnel as in the past with respect to promotions, downgrading, lateral transfers and bumping rights in the event of layoffs. Upon receipt of such assurances,[7] the Union raised no objections to the split.

Mr. Todd, the temporary manager of the "500 Managers Organization" having accomplished his mission of making the Shreveport's coin telephone operation more efficient, left the Shreveport plant on or about September 15, 1970, and returned to his permanent post at the Company's Indianapolis telephone manufacturing plant.

The record also reveals another instance where a group of some 25 unit employees under a separate coordinate manager known as the "714 Manager's Organization" enjoyed plantwide movement of personnel along with the great bulk of the unit employees in the "200 Manager's

[7] These assurances were given the Local's president by the plant's Labor Relations Manager W. D. Corliss who testified herein, "I told him that was my intention, to retain a single avenue for the movement of personnel."

Organization" prior to the split of October 1, 1970, under the terms of the collective-bargaining agreement here involved as applied by the Company.

On September 29, 1970, the Company through its aforementioned Industrial and Labor Relations Manager Corliss, notified the Local's Acting President W. R. Saddler by telephone of the Company's intention to make the temporary split of the original "200 Manager's Organization" permanent as of October 1, 1970. Saddler was also notified that any change in the *past* plantwide movement of personnel practices in connection with the permanent reorganization of the original "200 Manager's Organization" would be deferred until November 1, 1970, in order to give the Union the opportunity to discuss the reorganization and the effect it might have on the employees in the unit. This notification was confirmed in a letter dated September 30, 1970, by Corliss addressed to R. D. Myers, President of Local 2188, who could not be reached by telephone the day before. The concluding two paragraphs of the letter read:

> While the above reorganization will become effective 10/1/70, the Company will not implement any change in past movement of personnel practices until 11/1/70.
>
> This is in order to provide the Union full opportunity to review these changes.
>
> I am, of course, available to discuss this reorganization and any effect it might have on employees you represent. (Respondent's Exh. 5).

In accordance with its notice to the Local, the Company's temporary split of the appropriate unit for management purposes became permanent as of October 1, 1970, but a proposed restriction on the unit's existing plantwide movement of personnel to movement solely within each of the two manager's organizations was deferred until November 1, 1970, pending discussion and bargain-

ing thereon with the Union. Under the permanent split of the appropriate unit, Lee remained manager to the now diminished "200 Manager's Organization" and J. J. Scott became coordinate manager of the now permanent "500 Manager's Organization." Just prior to the permanent split of October 1, 1970, there were 2486 employees in the original "200 Manager's Organization." On October 1, 1970, 857 of these employees, mostly employees engaged in coin telephone production, were transferred to the new permanent "500 Manager's Organization." On the same date approximately 65 employees in the "300 Manager's Organization were transferred to the new permanent "500 Manager's Organization"; these approximate 65 employees consisted of some 35 professional engineers and some 30 technical employees.

From the beginning the Union vigorously protested and objected to the Company's proposed restrictions on the plantwide movement of personnel on the ground that it was contrary to the "intent" of the parties under the terms of the collective-bargaining agreement and contrary to established usage under the agreement. The Company with equal vigor maintained that it had the absolute right to restrict movement of personnel midterm under the literal terms of the contract and that the Union was aware of the Company's position on this when it negotiated the collective-bargaining agreement here involved and agreed to it by the literal terms of the agreement.

A total of eight joint meetings of union and company officials were held between October 5, 1970 and November 3, 1970, on the Company's proposed restriction on movement of personnel. Upon failure of the Company to secure the Union's approval of the proposed restriction, the Company unilaterally put it into effect on November 3, 1970. Under the restriction, movement of personnel was restricted to that within each of the two manager's organizations or "corridors," to use the word the Company

employs in its brief. More specifically, after the restriction was put into effect, the employees in the organized "200 Manager's Organization" under Manager Lee had movement of personnel on promotions, downgrading, lateral transfers, and layoffs *only* within Mr. Lee's corridor of management and the employees in the new permanent "500 organization" under Manager Scott had the same movement of personnel *only* within Mr. Scott's corridor of management. The parties are agreed that in a layoff under the newly restricted movement of personnel it is possible for a senior employee in Mr. Lee's corridor to suffer a layoff while a junior employee in Mr. Scott's corridor could be retained, or vice versa. It will be shown below that this restriction applied only to employees in grade 35 and higher.

The "intent" of the parties to the collective-bargaining agreement on the right or lack of right on the part of the Company to restrict movement of personnel under Article 28 of the collective-bargaining agreement is in large part reflected in the minutes kept by the Union and Western Electric of the eight bargaining sessions they had on the Company's then proposed restriction of movement of personnel insofar as these minutes show the prior history of negotiations and prior understandings between the Union and the Company on the rights of the contracting parties under Article 28. The minutes of the eight meetings as kept by the Company and the Union are in evidence as General Counsel's Exh. 2 (a) to (f), and Respondent's Exhibits 6 (a) to (h), respectively. The Company's minutes are complete as they contain minutes for each of the eight meetings; the Union's minutes are less complete as its minutes for the first two bargaining sessions, if kept, are not in evidence.

The two separate sets of minutes of the meetings are in remarkable agreement as to what occurred at the meetings of the Union and the Company on the latter's pro-

posed restriction of movement of personnel.[8] The company minutes for the first meeting[9] of October 5, 1970, in pertinent part read as follows:

> *Union by its representative:* I asked Bill to set up this meeting when I got word that the Company was tampering with movement of personnel. When activity of plant is being reduced, this is a violation of our agreement. By doing this, *you change the whole intent of the movement of personnel article as it was negotiated.* When you developed Dept. 201 [this obvious error should read Dept. 500], you said it was due to engineering problems. The Union was given assurance there be no change in movement of personnel. . . . (Emphasis supplied.)
>
> *Company by its representative:* There is no question about what happened last spring when he brought in Todd. We said there would be no change in movement of personnel since he was here on a temporary basis. WE thought when he left we would maintain our former position. Now it was decided we would make the permanent change. J. Scott. We also brought piece part manufacturing into this new branch. The rest will stay with George Lee. This we envision as a permanent change.
>
> *Union:* Doesn't this clash with what you told us last spring?
>
> *Company:* I think you can recognize that any organization will change. There are changing manufacturing conditions. We feel strongly that we have the right to do this under management of the business. Realign our own management. We realize that this will have an effect on movement of personnel for people 35 grade and up.

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[8] Counsel for General Counsel and Respondent also appear to agree that the two acts of minutes are substantially similar.

[9] There are no union minutes of record for this meeting.

Union: It affects everyone in plant on a layoff.

Company: Okay, it affects all employees on a layoff. But there will be no change in sub-branches. We tried to keep the effect to a minimum. The only change here is a new manager. Because this will effect movement of personnel, I told Bill we will hold off until November 1 so we would have a change to discuss.

Union: We feel this is a unilateral move on the part of the Company. The Company can reorganize its own management, but when you affect movement of personnel, you must bargain.

Company: You must recognize when bargaining a contract that there will be organizational changes as business changes.

Union: Our minutes will reflect that we never talked about more than one manager. (Emphasis supplied.)

Company: We did not anticipate another one at that time . . . (Emphasis supplied.)

* * *

Company: You do recognize the Company's right to run the business?

Union: No. We don't feel you have the right to make a move of this magnitude under the management right clause. We feel you have gone beyond your rights.

Company: With all the changes that take place, we cannot lock into any assistant manager's or manager's organization. We know it will change.

Union: Do you feel this is a non-negotiable item?

Company: Obviously not or we would have just done it. We want to hear any problems you might have. We feel we need to make changes. (Emphasis supplied.)

Union: You've heard the Union's position. Do you plan to make any changes? We feel this was a unilateral move.

Company: We feel this move was well advised. We don't intend to move these people back to one manager's organization.

Union: Even though this move was outside the contract?

Company: We don't feel it was outside the contract. We never gave any guarantee, implied or expressed, that this organization would not be changed. Business conditions change.

Union: This doesn't make sense with a decrease in the work force.

Company: The possibility or reorganization was no secret. I know your people have discussed what would happen when new manager's organization is made. We've done it at assistant manager level.

Union: Do you agree that this changes conditions of employment.

Company: I don't think it will have that much effect. Movement of personnel at 35 grade and above is within manager's organization, but it won't affect lower grades.

Union: It will affect employment rights.

Company: It will affect displacement rights on force reductions.

Union: It will cut it directly in half. Movement of piece parts too. You told us you would keep work flow in harmony. We feel this is disharmony.

Company: This is a judgment. We feel this move is proper.

Union: Let's make one thing very clear. We don't care who reports to who. We're concerned with movement of personnel. You can make any change you want.

The Company's minutes for the second meeting with the Union held on October 14, 1970, read in pertinent part as follows:

Company: (with reference to the new temporary "500 Manager's Organization"): . . . We told you we were setting up temporary organization. We told you no change in movement of personnel at that time. We anticipated that it would only be temporary.

• • •

Union: Let me straighten one thing out. We do have plantwide seniority now and we don't want this to change.

Company: We do not have plantwide seniority.

Union: Why are you bargaining now?

Company: Because a new manager's organization will effect movement of personnel.

Union: Do you consider this a change in employment rights?

Company: Change.

Union: . . . We have written proposal we'd like to present at this time.

Company: May we review it now. In third paragraph, you propose one manager's organization and no others. Movement of personnel be limited to a single manager's organization.

• • •

Third paragraph of Union's written proposal dated October 14, 1970, referred to in the above company minutes reads as follows:

> The Union proposes that the channels of movement negotiated in the General Agreement between the parties dated 24th July, 1969, which involves one manager's organization not be effected by this proposed reorganization; or any future reorganization concerning manager's organization, Shreveport Works, without agreement between the parties.

In subsequent meetings the Company made various proposals to the Union under which they offered to restore in increasing degrees the loss of pre-existing plantwide

movement of personnel the Company was proposing to take away under its management reorganization of the unit, but always *under the condition* that there would be a *cut off date* on such restorations of existing plantwide movement of personnel rights *some 3 or 4 months prior to the expiration of the then outstanding collective-bargaining* agreement scheduled by its terms to expire on July 23, 1971.[10] The reason offered at the trial by counsel for Western Electric for the Company's refusal to extend its offers of restoration of the pre-existing plantwide movement of personnel *for the life of the contract* " . . . was that so if [the Company] would not go into the . . . contract bargaining . . . in a position worse than that which it had under the words of the agreement as negotiated and written." (Tr. 275) The Union rejected the Company's offers of restoration of plantwide movement of personnel for a period *short* of the duration of the agreement because it believed the Company's proposal was something less than "we felt we already had," that is, plantwide movement of personnel for the duration of the collective-bargaining agreement. (Tr. 183)

Of the minutes kept by the Union on its bargaining sessions with the Company, only two bear on the issue of the "intent" of the parties under Article 28 of the collective-bargaining agreement on the Company's right or lack of right to curb midterm the pre-existing plantwide move-

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[10] The details of these successive proposals by the Company to the Union are shown in the Company's brief as follows:

1. Permit employees to cross Manager lines once in upgrading situations, within six months.

2. Permit employees to cross Manager lines once in upgrading situations, and an unlimited number of bumping situations, within six months.

3. Permit unlimited upgrading and downgrading across Manager lines for six months.

4. Permit unlimited upgrading and downgrading across Manager lines for seven months. (Tr. 2 3-44)

ment of personnel. The first of these, the Union's minutes of the meeting of October 19, 1970, reads in pertinent part:

Company: We have met several times on this subject and at our last meeting you presented us a proposal.

Union: Our proposal concerns only the Movement of Personnel.

Company: We cannot totally go along with your proposal as it changes the contract as we see it.

Union: We know that other locations have worked our Agreement on plantwide placement in an effective lack of work situation.

Company: Only two (2) locations have this form the '69 bargaining.

Union: Our intent was never to have it where junior people are on the roll while senior people are laid off. How many contracts have we bargained here?

Company: Four.

Union: Don't you agree the intent has always been one manager? (Emphasis supplied.)

Company: Yes, but no one has said we would always have just *one.* (Emphasis supplied.)

Union: I don't recall us ever bargaining about this.

Company: Well as we grow you can understand the need for changes.

* * *

The other union minutes which bears on the issue is on the meeting of October 29, 1970, which in pertinent part reads:

* * *

Union: . . . we negotiated only one manager's organization last year. (Emphasis supplied.)

Company: Do you think any future meetings would be fruitful?

Union: I don't know, we feel that our proposal is reasonable and don't feel this is an extension of the contract.

* * *

Company: Your last position is that movement be same for the life of the agreement.

Union: Yes.

* * *

At the trial, counsel for the Company in his direct examination of the plant's aforementioned Labor Relations Manager Corliss, directed his attention to that part of the Union's minutes of October 19, 1970, as set forth above which reads:

Union: Do you agree the intent has always been one manager?

Company: Yes, but no one has said we would always have just one. (Emphasis supplied.)

Company counsel then asked Corliss whether he recalled that question and answer. Corliss did not deny the question and "Yes" answer but merely stated "Well, I don't recall the exact words" and then sought to avoid the impact of the answer "Yes" to the question by elaborating at length on the "no one has said we would always have just one." From the above-quoted minutes, from Corliss' testimony, and from the record as a whole, the Examiner finds that Corliss as spokesman for the Company at the bargaining meeting of October 19, 1970, did make the admission attributed to the Company in the union minutes of that meeting as shown above.

In all the previous collective-bargaining negotiations since 1966 leading to the four successive collective-bargaining agreements between the Union and the Company, the subject of whether the parties, under the standard permanent provisions of Article 28 of such contracts "intended" the movement of personnel to continue to be plantwide as it has been from the beginning, came up for express discussion only once. In 1968 while negotiating the 1968 contract, the Union sought a change in the language of Article 28 to more clearly and expressly preserve for the employees in the bargaining unit the plantwide movement

of personnel that they had historically enjoyed under a single manager since 1966. Under the language of Section 2.1 (c)(2) of the contract, vacancies in grades 35 and above are filled in "the Manager's organization having the vacancy" . . . and "from within the Manager's organization having the vacancy." Fearful that the Company might at some future date under its right of management article in the collective-bargaining agreement (Article 2) put on additional coordinate supervisors or managers of the bargaining unit and then claim the right to restrict movement of personnel from the former plantwide movement to that strictly within each manager's organization or corridor, the Union sought a change in the language of Article 28 to make vacancies in grade 35 and above fulfillable not from the ranks of "the Manager's organization" as the article reads but from the ranks of bargaining unit throughout the "Shreveport Works" which is the designation the Company's plant is given in the collective-bargaining agreement. The Union was gravely concerned that in the event the Company chose to add another coordinate manager to the management of the bargaining unit and a massive layoff thereafter took place, a senior employee in one of the two management organizations could find himself out on the street without a job while a junior employee in the other manager's organization would be retained. The union officials expressed this fear many times to the company officials during the two meetings in 1968 in which the Union sought the described change in the language of Article 28.

Corliss, replying for the Company, denied the Union's requested change in the language of Article 28, but gave the Union firm assurances that he "did not contemplate additional manager's organizations." (Tr. 283) Not withstanding this assurance, Corliss told the Union officials at the meeting that the single management of the unit "could possibly change." (Tr. 213) With the Company's assurances that it did not contemplate any changes in the single management of the bargaining unit, the Union did

not press for the language change in Article 28 and it remained the same as it had been since 1966. From the testimony of record[11] on the 1968 negotiations as they relate to Article 28, the Examiner infers and finds that the Union did not consciously yield or waive its claimed right to plantwide movement of personnel for the duration of the 1968 collective-bargaining agreement as contended by the Company.

As heretofore indicated, the single manager of the bargaining unit from 1966 to November 2, 1970, had a number of assistant managers working under his supervision. Just prior to the split[12] of November 3, 1970, Mr. Lee as manager of the original "200 Manager's Organization," or bargaining unit, had seven assistant managers working under his supervision who were in turn in charge of the various phases of the manufacture of telephone sets and component parts. Each assistant manager had a numbered title such as "220 Assistant Manager" (in charge of production control and merchandise functions) and "250 Assistant Manager" (in charge of sub and final assemblies of telephone sets).

Although the language of Article 28 of the collective-bargaining agreement on the movement of personnel on the filling of job vacancies *within "the Manager's Organization"* for vacancies in grade 35 and higher and on the filling of vacancies within "the Assistant Manager's Organization" for vacancies in grade 34 and lower, are lit-

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[11] The only testimony of record on the 1968 contract negotiations with respect to Article 28 was received from the plant's Labor Relations Manager Corliss. (Tr. 210-216; 283-284) The only other witness in this proceeding, the Local's vice president Horton, did not testify with respect to the 1968 negotiations on Article 28 as he was not a participant thereto. He did not become a union officer until 1969.

[12] After the split, Lee had only four assistant managers under him and Scott as the other coordinate manager of the bargaining unit had three assistant managers.

erally identical, *historically* the movement of personnel has at all times been different for employees in grade 35 and higher under "the Manager's Organization" than for employees in grades 34 and lower under an "Assistant Manager's Organization." From February 22, 1966 to November 2, 1970, the filling of vacancies *in the single manager's organization in grades 35 and higher* has always been *on a plantwide basis.* On the other hand, the filling of vacancies *in an assistant manager's organization in grades 34 and lower* has always been *solely within the assistant manager's organization* and never on a plantwide basis.

The Company in 1967, during the life of the 1967 collective-bargaining agreement, unilaterally split one of the *assistant* manager's organizations, known as the "250 Assistant Manager's Organization" under Manager Lee into *two assistant* manager's organizations, one of which retained its original "250" designation and the other was named the "260 Assistant Manager's Organization." Similarly in 1969 during the pendency of the 1968 contract, the Company unilaterally split the aforementioned new 260 assistant manager's organization into two, thereafter known as the 260 and 280 *assistant* manager's organizations, respectively. It is established by stipulation of the parties that these splits were made *after* prior oral notice to the Local and that the Local did not seek to bargain with the Company on its then proposed actions or the effects thereof on the movement of personnel. It is to be noted that these were splits of *assistant* managers' organizations, *not of the single manager's organization of the entire bargaining unit.*

From the bare bone record of the above stipulated facts on the Company's unilateral prior splits of management on the *assistant* managers' level the Examiner finds that the Union's failure to challenge those splits was not a conscious waiver of its right to challenge the Company's unilateral fragmentation of the pre-existing plantwide movement of

personnel on the *single manager's level* as the Company appears to contend.

The November 3, 1970 split of Manager Lee's "200 Management Organization" did not affect the movement of personnel of all of the employees in the bargaining unit, but only of employees in grade 35 and higher. Under Article 14 of the collective-bargaining agreement, the Company maintains ten job grade levels at its Shreveport plant, numbered 32 to 41, inclusive, with 32 being the lowest level at which employees are employed and 41, the highest. As of July 24, 1969, the hourly wage rate for employees in the unit ranged from $2.10 for grade 32 to $3.75 for grade 41.

Before the split, the movement of personnel of employees in the lower grades 32 through 34 with respect to promotions, downgrading, and layoffs, had always been restricted to that within the *assistant* manager's organization in which such lower grade employees worked. After the split, the movement of personnel for grades 32 through 34, as in the past, continued to be restricted to that within the *assistant* manager's organization in which such graded employees worked. As this continued restriction on the movement of personnel for grades 32 to 34, after the split did not in any way change the pre-existing working conditions of such lower grade personnel, General Counsel does not contend that the continuation of the restriction of movement of personnel for employees in grades 32 to 34 after the split to that within their assistant's management's organization is in violation of Section 8(a)(5) of the Act. Such continued restriction of movement of personnel for grades 32 to 34 is thus not an issue in the case.

Before the split of the original "200 Manager's Organization," the movement of employees in grades 35 and higher was plantwide. After the split of the old 200 organization into the diminished 200 and the new 500 organization, the movement of personnel for such grades 35 and higher

employees was no longer plantwide (with certain exceptions not deemed of sufficient importance for detailing here) but restricted to that within the 200 or 500 organization in which such employees worked. This was an actual change in the pre-existing working conditions of such higher graded employees, whether or not such a change is authorized by the terms of the collective-bargaining agreement which is the issue to be decided herein.

The record does not reveal the number of employees in the bargaining unit with grades of 35 and higher. However, the testimony of the plant's Labor Relations Manager Corliss shows that there are "many, many" employees in grades 35 and higher in both the truncated 200 and the new 500 organization. It is inferred from Corliss' testimony and from the fact that there are seven grades of 35 and above as against only three grades below 35 that at least half of the bargaining unit consists of employees who are in grades 35 and above and that accordingly at a minimum one-half of the unit could have their pre-existing working conditions adversely affected by the new restriction on the movement of personnel in layoffs, promotions and downgrading.

It is established by stipulation that since November 3, 1970, the Company has not permitted movement of personnel in grades 35 and higher between the 200 and 500 organizations regardless of the relative qualification of employees. It is also established by stipulation that since November 3, 1970, the Company "in all cases, without regard to qualification, has not considered employees in one manager's organization for upgrading or downgrading into . . . the other manager's organization," except in hardship cases.

In the summer of 1970 the bargaining unit was reduced by layoffs due to lack of work from about 3,200 employees to about 2,500 employees. This figure of 2,500 was roughly the number of employees in the unit on November 3, 1970,

when the Company implemented its split of October 1, 1970, by restricting movement of personnel to that solely within each of the two coordinate manager's organizations. The uncontradicted testimony of Local's Vice President Horton shows that if a similar reduction of force took place after November 3, 1970, "The potential effect of the split could be every employee in the unit."

The Respondent's minutes of the bargaining conference of October 5, 1970, on the Company's then proposal to restrict movement of personnel as above described shows that the Company "realized that this will have an effect on movement of personnel for people 35 grade and up." From and after the effective date of the new restriction, the Company could go to the street to fill a 35 and higher vacancy in one of its two manager's organizations although there could be many qualified candidates for such vacancies in the other manager's organization within the bargaining unit. The Company's minutes for the same meeting also acknowledge that its then proposed restriction of movement of personnel would "affect all employees in a layoff."

In the 7-month interval between the effective date of the new restriction on the movement of personnel and the trial of this case, 10 grievances have been filed by the Union in behalf of employees in the unit whom the Union claims have been adversely affected by the new restrictions on the movement of personnel. These grievances are in various stages of development under the grievance and arbitration procedures of the collective-bargaining agreement. Two of the involved grievants complain that they have been downgraded and the other six complain that they have not been upgraded for promotions, all because of the adverse affect upon them of the Company's new restriction on the movement of personnel. In addition the record shows illustrations of several other employees who were likewise adversely affected by the restriction but did not file

grievances as the Local felt that the prototype grievances it had already filed would control the cases of such other employees. Counsel for the Company admits that there are some 10 to 14 employees who may have been affected by the new restriction but who have not filed grievances.

In the same 7-month interval between the effective date of the new restriction of personnel and the trial of this case, a combined total of about 50 promotions of unit employees took place in the two manager's organizations. The promotions in each of the two manager's organizations took place without investigation or consideration of whether any of the employees in the other manager's organization had superior seniority and qualifications for such promotions.

The described 7-month period has been a relatively stable period in terms of employment in the bargaining unit. In that 7-month period there have been no layoffs at the plant and employment in the unit increased from 2,500 to 2,700 employees. For this relatively short and quiet period, the Examiner finds and determines that the dozen or so known employees who appear to have been adversely affected [13] by the new restrictions on the movement of personnel and the undetermined number of employees who might have had some of the 50 promotions made in the period if these promotions had been made under the former plantwide seniority enjoyed by the employees rather than within manager's organizations, represent a substantial, if fractionally small, number of employees who appear to have been adversely affected by the new restriction on movement of personnel. Considered individually, the restriction seriously affects each affected

[13] No findings are intended here on the rights of such employees, but left for determination under the Board's compliance procedures.

employee in terms of wages when downgraded,[14] and in chances for promotion and dangers of a layoff.

But potentially in the event of a massive layoff of 500 or more employees such as occurred in the summer of 1970, the Examiner finds from the evidentiary findings above that the new restricted movement of personnel has every likelihood of resulting in the layoff of senior employees in one of the two manager's organization while junior employees are retained in the other manager's organization. Similarly, under the new restriction on movement of personnel, a serious drop of business in one of the manager's organizations has the strong potential of resulting in the downgrading of higher grade senior employees in that manager's organization while junior employees in the same high grade positions in the other manager's organization retain their grade positions.

But the effect of the split is potentially far more pervasive than the mere layoff of senior employees in one of the two manager's organization while junior employees in the other manager's organization are retained. Because of the chain reaction, each employee who is downgraded or bumped out of turn because of the split would be affected. This is because the intermediate steps of "successive" bumping prior to reaching the end result (i.e., the last employee to be downgraded or the last employee to be laid off) would affect any number of employees.

The testimony of the plant's Labor Relations Manager Corliss shows that while there is a certain amount of specialization on the part of the unit employees in each of the

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[14] Although employees who are downgraded received under the collective-bargaining agreement the same wage per hour in their downgraded grade as they had in their prehigher grade, their periodic wage increases under the contract is governed by their grades; the higher grades receive higher periodic wage increases than do the lower grades. Thus a downgrading generally results in a loss of the higher instep raises for higher paid positions.

two manager's organizations, "there are no clearcut lines where only one job is done in one or the other. . . ." Corliss' testimony further shows that "there's some degree of transferable skills" between the two manager's organizations.

The Company claims the right under Article 2 of the collective-bargaining agreement entitled "Management of Business" to add additional manager's organizations to the bargaining unit as it sees fit. General Counsel does not contest this claim. The Examiner finds that under the contract the Respondent had the right to split the original "200 Manager's Organization" into two manager's organizations as it did on October 1, 1970.

The Respondent also claims that there was an economic justification for installing an additional manager's organization to the theretofore single management of the bargaining unit. General Counsel does not appear to contest this claim. From the evidentiary findings above, the Examiner finds that Respondent had economic justifications for adding a second manager to the unit.

The Respondent also claims the right under the terms of Article 28 of the collective-bargaining agreement for the unilateral action it took on November 3, 1970, in restricting the pre-existing plantwide movement of personnel to that within each of the two manager's organizations under its management reorganization of October 1, 1970. This is the central issue in the case; it will be discussed and determined below in the next section of this Decision. Counsel for the Company do not claim any economic justification for the restriction but rely solely on the Company's right to restrict movement of personnel under the terms of the contract as appears from the following statement of one of Respondent's counsel at the trial: "Respondent is not contending that the reason that employees were restricted after this decision [i.e., the decision to divide the single management organization into two organizations] was

made, in terms of movement of personnel, was because of economic reasons. That is not our contention. It was restricted because of the content [i.e., of Article 28 of the collective-bargaining agreement]." (Tr. 229) In view of this admission by Respondent's counsel that the restriction was not put into effect for economic reasons, the Trial Examiner asked Corliss, the plant's said Labor Relations manager, why the Company was so adamant in insisting upon putting into force the new restriction on movement of personnel despite the strong and unwavering opposition of the Union. He answered that if the crossing of manager's lines were allowed under the reorganized management of the unit "we might be involved in additional training." (Tr. 245)

From the evidentiary findings above showing that there are no clear cut lines "where only one job is done in [one] or the other" of the two manager's organizations, and that there is some degree of transferrable skills between the two manager's organizations, the Examiner finds and concludes that the chances that the Company "might be involved in additional training" if the crossing of manager's lines were allowed for promotional purposes is minimal. It is inferred and found from the record as a whole that the Company would normally be involved in more training of new employees hired by the Company from off the street than in the training of employees already on its payroll desiring to transfer from a job in one of the two manager's organizations to a job in the other.

Summarizing, the record shows and the Examiner finds that prior to November 3, 1970, the unit employees in the Company's Shreveport plant in grades 35 and above had plantwide movement of personnel with respect to promotions, downgrading, lateral moves, and in layoffs, but that from and after November 3, 1970, their movement of personnel was limited and restricted to the manager's organization to which they were assigned and in which they worked.

Discussion and Conclusions

The ultimate decision for resolution here is whether the Company had the contractual right under the terms of the collective-bargaining agreement to unilaterally restrict the pre-existing plantwide movement of personnel during mid-term of the agreement. From the evidentiary findings set forth above and the record as a whole, the Examiner finds and concludes that it was the intent of the parties under Article 28 of the collective-bargaining agreement that the movement of personnel in grades 35 and higher should at all times be and remain plantwide during the life of the contract as it had been under the three previous successive collective-bargaining agreements.

Accordingly the Examiner finds and concludes that the Company's unilateral action of November 3, 1970, restricting the rights of the employees in the bargaining unit with respect to promotions, downgrading, lateral transfers, and layoffs to that within one or the other of the two manager's organizations to which they were assigned under the management reorganization of October 1, 1970, altered Article 28 of the collective-bargaining agreement and constituted a change in their established working conditions in violation of Section 8(a)(1) and (5) and 2(6) and (7) of the Act.

As stated in Respondent's brief, "the basic issue in this case turns upon the proper interpretation of Article 28" of the collective-bargaining agreement. The Company contends that the literal language of Article 28 gives it the right to restrict movement of personnel to that within each of the two manager's organizations and thereby to prohibit the movement of personnel across Manager's organization lines. In support of its contention the Respondent points to the language of Article 28 which provides that vacancies in grade 35 and higher shall be filled in "*the* Manager's organization *having the vacancy*" and that vacancies in journeymen's occupations shall be filled "from

within the Manager's organization *having the vacancy.*" (Emphasis supplied.) Respondent also points to other language of the Article 28 dealing with successive bumping rights senior employees have in the event of widespread layoffs due to lack of work. In such situations Article 28 provides that an affected employee has displacement rights *"in his own Manager's organizaton."* (Emphasis supplied.) From these quoted phrases in Article 28, the Company argues that Article 28 "authorizes the Company to restrict movement of personnel from one manager's organization to another, *no* matter how many manager's organizations there may be." (Emphasis supplied.)

While it is true that the literal language of Article 28, if not directly[15] at least impliedly, supports Respondent's contention that the contract authorizes restrictions on the movement of personnel from one manager's organization to another, the record is otherwise overwhelming that this was contrary to the intent and understanding of the parties at the time the 1969 collective-bargaining agreement here involved was negotiated and that the real intent of the parties had been that there would be a continuation of the *status quo* of plantwide movement of personnel under a single manager as in the past under three previous successive collective-bargaining agreements, all of which contained articles identical with or wholly similar to Article 28.

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[15] The contract would have avoided the present controversy if it had directly stated that while the bargaining unit has always been under the management of a single manager, the parties agree that the Company may at any time during the life of the contract add additional managers to the management of the unit and that in connection therewith the Company would have the right to restrict movement of personnel from one manager's organization to another. Instead the Company relies on inferences to be drawn from such phrases in Article 28 as read that vacancies shall be filled in "the Manager's organization having the vacancy" as giving it the authority to put on additional managers and restrict movement of personnel to the corridors of each manager's organization.

This intent was admitted by the Company at one of the eight bargaining sessions it held with the Union on its proposal to restrict movement of personnel from the previous plantwide movement. As the findings above show, this appears from the Union's minutes of the meeting of October 19, 170, in which the following colloquy took place:

> *Union:* Don't you agree the intent has always been one manager?
>
> *Company:* Yes, but no one has said we would always have just one. (Emphasis supplied.)
>
> *Union:* I don't recall us ever bargaining about this.
>
> *Company:* Well as we grow you can understand the need for changes. . . .

At the earlier meeting of October 5, 1970 (the first meeting), the minutes of the Company show that when the contract here under consideration was negotiated in 1969 the parties negotiated under the understanding that there would be only a single overall company manager of the bargaining unit as appears from the following excerpt from the minutes:

> *Union:* Our minutes[16] will reflect that we never talked about more than one manager.
>
> *Company:* We did not anticipate another one at that time.

Any review of the minutes of the parties on their postcontract bargaining sessions on the Company's postcontract proposal to impose limits on the existing plantwide movement of personnel clearly shows that the involved 1969 contract had been negotiated with the intent that the bargaining unit would remain under a single overall company manager under whom the employees would continue to have plantwide movement of personnel as in the past.

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[16] Neither the Union or the Company offered in evidence the minutes they kept of the negotiations leading to the 1969 collective-bargaining agreement here under consideration, presumably because they showed no discussion on the text of Article 28.

At the time the 1969 contract was negotiated the Company had no plans or present thoughts of splitting the single management of the unit into a dual management.

The only time Article 28 came up for direct discussion was in connection with the negotiations for the 1968 contract, not the 1969 agreement, when the Union, in order to avoid any future misunderstanding, requested changes in the language of Article 28 to expressly provide for plantwide movement of personnel to conform with the actual practice under all preceding Articles 28 in all previous collective-bargaining agreements. The Company declined to make the changes on the ground that the presently existing single management of the unit and, with it the plantwide movement of personnel, "could possibly change," but gave positive assurance to the union officials that the Company had no present thoughts or plans to put on additional managers to the unit. With these assurances the Union did not press for the requested changes in the language of Article 28, but there is nothing in the record to suggest or indicate that the Union consciously yielded or clearly and unmistakenly waived its interest in the matter as is required under well established authority for proof of a waiver of the right to bargain on such vital matters of employee concerns as promotions, downgrading, and seniority rights in layoffs.[17] Because of the assurances that no present changes in the existing plantwide movement of personnel were contemplated, the changes the Union asked for in the language of Article 28 became academic and not worthy of prolonged discussion and ne-

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[17] See cases collated in footnotes 11 and 12 of the Trial Examiner's Decision in *Rockwell-Standard Corp.*, 166 NLRB 124 enfd., 410 F.2d 953, at ft. 2 (C.A. 6), as well as text of the Trial Examiner's Board adopted decision at page 132 on requirements for a "waiver." See also *Unit Drop Forge Division, Eaton Yale & Towne Inc.*, 171 NLRB No. 73 at page 5.

gotiation.[18] But it is quite apparent from the fight the Union put up when the Company proposed the present curtailment of the pre-existing plantwide movement of personnel as culminating the instant proceedings that the Union did not in the negotiations for the 1968 contract deliberately and knowingly waive its right to bargain and even strike for the preservation of the pre-existing plantwide movement of personnal had since 1966. The preservation of this plantwide movement of personnel was and is of vital importance to the Union because a division of such plantwide movement of personnel under separate managers could among other adverse effects lead to senior employees losing their jobs in one manager's organization during a massive layoff while junior employees retain their equivalent positions in the second manager's organization. This was the ever present concern of the union officials at the eight bargaining sessions held with the Company before the Company unilaterally and without union consent imposed the new restriction on the plantwide movement of personnel.

The Examiner further finds and concludes from the above evidentiary findings that the Union did not waive its right for bargaining on the effect the splitting of the single manager's organization would have on the movement of personnel by its failure to request bargaining on the Company's past actions under prior collective-bargaining agreements in splitting assistant manager organizations as contended by Respondents. As heretofore found, historically the movement of personnel for employees in grade 34 and below has always been within the *assistant* manager's organization to which such employees happen

[18] The Union's decision not to become involved in prolonged negotiations about the academic possibility that the Company might put on an additional manager in view of company assurances that it had no present plans or thoughts of doing so turned out to be a sound judgment as the Company did not in fact put on any additional managers of the unit during the life of the 1968 contract.

to be assigned whereas the movement of personnel for employees in grade 35 and above prior to November 3, 1970, has always been in the manager's plantwide organization. Up until October 1, 1970, the *manager's* organization has always been plantwide whereas all *assistant* manager organizations at all times both before and after October 1, 1970 have always been only designated sections within the single manager's plantwide organization. Thus historically the movement of personnel on an assistant manager's level has always been within the assistant manager's less-than-plantwide organization for employees in grades 34 and below whereas historically the movement of personnel for employees in grades 35 and above had always been until the Company's unilateral action of November 3, 1970, within the single manager's plantwide organization. For this reason it follows that the failure of the Union to request bargaining on the splitting of *assistant* manager's organizations was not a conscious and deliberate waiver of the Union's right to contest the splitting of the single manager's organization insofar as it affected the traditional working conditions of employees in grade 35 and above as enjoyed by them since the beginning of the contractual relationship in 1966 between the Union and the Company. The latter involving the rights to promotions and job security on a plantwide basis are of such vital interest to the employees in the unit that it cannot be assumed that there has been a waiver thereof in the absence of clear and positive proof of such waiver. That element is lacking in the instant case.

If history sustains the right of the Company under Article 28 to contain movement of personnel for employees in grades 34 and lower to that within their assistant manager's organization, then history under Article 28 also sustains the right of employees in grades 35 and above to plantwide movement of personnel within the original single manager's plantwide organization for the duration of the life of the collective-bargaining agreement here involved.

Another argument advanced by the Company is that its unilateral imposition of the rule against the movement of personnel across manager's organizations should in any event be allowed to stand on the ground that the restriction has had only what it deems a nonsignificant impact on the bargaining unit in the 7 months the restriction has been in effect, under a line of cases involving unilateral subcontracting. *Westinghouse Electric Corp.*, 150 NLRB 1574; *American Oil Co.*, 151 NLRB 421; *Allied Chemical Corp.*, 151 NLRB 718. In these cases the Board held that the employers were not in violation of the Act by their unilateral acts of subcontracting work out because the subcontracting did not involve any significant impact on unit employees' job interests.

But it is obvious from any perusal of these subcontracting cases that the Board weighed the Employer's economic advantages from such subletting as established by long prior practice against the adverse impact of the subcontracting on the employees in the unit in arriving at a decision of whether there had been a violation of the Act and that where the record historically showed strong economic advantage to the Company and no significant adverse impact or detriment to the employees, the Employer has been found not to be in violation of the Act.

The instant case does not involve any subcontracting but even if the holdings of the Board in the above-cited cases are deemed applicable, the record here fails to show any economic advantages to the Company for the substitution of its rule against the movement of personnel across manager's organizations for its former long established practice of allowing plantwide movement of unit personnel. A sharp distinction must be drawn between the economic advantages to the Company in the splitting of the original unitary management organization of the unit into two and its new rule limiting movement of personnel to that within each of the two manager's organizations. This is because the record shows definite economic justification

for the splitting by reason of increased efficiency, but no economic benefits or virtually none accruing to the Company from its new restriction on the former plantwide movement of personnel. While the plant's Labor Relations Manager Corliss claimed some economic disadvantages in allowing the crossing of manager's organization after the split as "we might be involved in additional training,' "[19] counsel for the Company openly conceded that the Company was not claiming any economic advantages from the new restriction on the movement of personnel, as it places its sole reliance on the language of Article 28 for the authorization of the new restriction. (But as shown above, Article 28 interpreted in the light of the intent of the parties shows that the parties intended the pre-existing plantwide movement of personnel under Article 28 to continue for the life of the contract.)

Thus by the Respondent's failure to show any significant economic benefits to itself from its new restriction on the movement of personnel, the Respondent's unilateral imposition of the restriction is a violation of the Act even under the Board's holdings in the cited subcontracting cases upon which it relies.

However, even if the "significant impact" test of the cited subcontracting cases is applied here, the record shows that the Company's new restriction on the movement of personnel does have a significant present and potential impact on the employees in the bargaining unit. The Company's minutes of the midterm bargaining sessions with the Union on its then proposed new restriction on the movement of personnel shows that the Company

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[19] It would appear that it would be quicker and easier to train a present employee in one manager's organization for an open position in the other manager's organization than to train a new employee brought in off the street, especially in view of Corliss' admission that there is some degree of transferrable skills between the two manager's organizations.

was aware that it would have an effect on employees in grade 35 and above and that "It will affect displacement rights on force reductions."[20]

The above findings of fact further show that in the relative short and stable period of employment of 7 months since the new restriction on movement of personnel was put into effect there are a dozen or so known employees who have filed grievances and appear to have been adversely affected by the new restriction and an undetermined number of employees who might have had some of the 50 promotions made in the period if these promotions had been made under the former plantwide seniority enjoyed by the employees prior to the new rule. In addition there are some 10 to 14 employees who appear to have been affected by the new restriction but who have not filed grievances. Considering the brevity of the elapsed time and stableness of the employment situation therein, the Examiner finds and concludes that this evidence shows strong indications that the new restriction has had a significant adverse impact on the employees in the unit. A much more widespread and serious impact on the unit would take place if the Company had another massive layoff due to lack of work such as it did in the summer of 1970 before the new restriction went into effect when more than 500 employees were laid off. In that situation the record shows a very strong potentiality that quite a number of senior employees in one manager's organization could be laid off while junior employees in equivalent positions are retained in the other manager's organization.

In review, the record shows that the collective-bargaining agreement here involved and its three predecessor agreements were all executed under the present reality of a single manager of the bargaining unit inextricably tied

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[20] See quotations from Company's minutes of the meeting of October 5, 1970, as set forth in the findings of fact above.

in to a plantwide movement of personnel. So firmly fixed and established was this right of the unit employees to plantwide movement of personnel that the Company's minutes of its initial negotiating session with the Union of October 5, 1970, shows that it recognized that its then proposed restriction on the existing movement of personnel was a "negotiable" item.[21] But even before this when the Company first split the 200 manager's organization into two separate and independent manager's organizations on a temporary basis the Company recognized the inviolable nature of the pre-existing plantwide movement of personnel by its absolute assurances to the Union that the movement of personnel would not be disturbed by the temporary split. It was only after the Company decided to make the split permanent that it took its present position that the collective-bargaining agreement "required" it to prohibit the movement of personnel across manager's organizations. The fact that the Company for an undisclosed period of time prior to October 1, 1970, allowed a group of unit employees in a then separate and independent "714 Manager's Organization" the same free plantwide movement of personnel as was had by the unit employees in the "200 Manager's Organization" shows that there is nothing in the collective-bargaining agreement according to the Company's own prior understanding of the document which "requires" it to restrict movement of personnel across manager's lines.

As the record shows that virtually no economic benefits flows to the Company from its new restriction of the former plantwide movement of personnel, it appears that the Respondent is engaging in a mere power struggle with the Union for the right to impose the restriction as opposed

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[21] The Company's minutes for that meeting shows that the Company, in answer to the Union's inquiry, "Do you feel this is a non-negotiable item [i.e., the Company's then proposed restriction on the existing plantwide movement of personnel]?" replied, "Obviously not or we would have just done it."

to the Union's genuine concern that the vital interests of the unit employees in the matter of promotions, downgrading, lateral transfers, and layoffs be preserved as in the past on a plantwide basis for the remaining life of the collective-bargaining agreement.

It is well established that a unilateral alteration by an employer of a bread and butter provision of a collective-bargaining agreement is a violation of Section 8(a)(5) and (1) of the Act. *C & S Industries, Inc., supra; The Standard Oil Co.*, 174 NLRB No. 33; *General Electric Co.*, 177 NLRB 401; *Unit Drop Forge Division, Eaton Yale & Towne, Inc.*, 171 NLRB No. 73; *Wisconsin Southern Gas Company, Inc.*, 173 NLRB 480; *Brotherhood of Locomotive Firemen and Enginemen*, 168 NLRB 677. The present case falls within the ambit of these Board decisions by reason of Respondent's unilateral alteration of the preexisting plantwide movement of personnel under Article 28 of the collective-bargaining agreement during the life of the contract and is accordingly in violation of Section 8(a)(5) and (1) of the Act. However, it is found that Respondent's unilateral split of the "200 Manager's Organization" *per se* and without reference to the Company's follow-up restriction of the movement of personnel across manager's lines of authority, was within the Company's authority under Article 2 on the "Management of the Business." Accordingly insofar as the complaint alleges a violation of the Act by reason of the Respondent's unilateral split of the 200 organization *per se* it will be dismissed.

Upon this basis of the foregoing findings of fact and upon the entire record of the case, the undersigned makes the following:

Conclusions of Law

1. Respondent is engaged in commerce and the Union is a labor organization, all within the meaning of the Act.

2. All hourly-rated production and maintenance employees in the Manufacturing Division of Respondent's Shreve-

port, Louisiana plant, but excluding office and plant clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. At all times herein material, International Brotherhood of Electrical Workers, Local Union No. 2188, AFL-CIO, has been the duly recognized collective-bargaining representative within the meaning of the Act of all employees in the above-described appropriate unit.

4. At all times herein material there has been a collective-bargaining agreement in effect between the Respondent and the Union covering the above-described appropriate unit, effective from July 24, 1969, until July 23, 1971.

5. Article 28 of the aforesaid collective-bargaining agreement by the intent of the parties thereto provides for plantwide movement of personnel for all employees in grades 35 and higher in the above-described appropriate unit.

6. Respondent on November 3, 1970, unilaterally, without agreement with the Union, altered the plantwide movement of personnel provided for in said Article 28 and thereby caused a unilateral change in the established working conditions of the employees in the unit during the lifetime of its collective-bargaining agreement with the Union.

7. The said unilateral change in the established working conditions without agreement of the Union indicates significant adverse affects on the employees in the unit and carries with it a strong potential for future adverse significant affects on the unit employees.

8. The Union at no time waived its contractual right to retain the plantwide movement of personnel they have had under collective-bargaining agreements since 1966.

9. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by its unilateral act of November 3, 1970, limited the pre-existing plantwide movement of personnel resulting in unilateral changes in established working conditions for the unit employees.

10. The collective-bargaining agreement here involved does not provide for a deferral to final and binding arbitration on the question of whether Article 28 thereof on the "Movement of Personnel" gives the Respondent the right to initiate unilateral restrictions on the pre-existing plantwide movement of personnel.

11. The contract dispute between the Respondent and the Union over the Respondent's right under said Article 28 to limit the pre-existing plantwide movement of personnel is not deferrable under the provisions of the collective-bargaining agreement to final and binding arbitration.

12. Respondent's unfair labor practices in unilaterally changing the established working conditions of unit employees on such mandatory bargaining subjects as promotions, downgrading, and layoffs through restrictions on the pre-existing plantwide movement of personnel is not subject to deferrals to arbitration under Board decisions.

13. The described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Remedy

It having been found that the Respondent engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent's action of November 3, 1970, restricting plantwide movement of personnel for employees in grade 35 and above is a violation of Section 8(a)(1) and (5) it will be recommended that the Respondent is ordered to retroactively revoke and rescind said rule as of November 3, 1970, and that it simultaneously restore as of the same date the plantwide movement of personnel thereto enjoyed by such unit employees.

Under the November 3, 1970, restriction on the former plantwide movement of personnel some unit employees may have lost promotions, some may have suffered downgrading, some may have been denied lateral transfers, and some may have been laid off while less senior employees were retained, all of which adverse personnel actions they may not have suffered under the old plantwide movement of personnel. The identity of these employees and the extent of their detriment can only be determined in the compliance stage of this proceeding. As it is Board policy to restore the pre-existing status to employees who have been adversely affected by an employer's unilateral action,[22] it will be recommended that the Company restore the *status quo ante* to all unit employees who have been adversely affected by the restriction on the former plantwide movement of personnel as determined in the compliance stage of this proceeding, to progress them to the status they would have had if there had been no change in the pre-existing free plantwide movement of personnel, to reinstate senior employees who have been laid off[23] while

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[22] This will be in accordance with the Board's policy to restore the *status quo ante* to employees who have been adversely affected by an employer's unlawful unilateral action. *Beacon Journal Publishing Co.*, 164 NLRB 1187 and Supplemental Decision in 173 NLRB 1187.

[23] There have been no layoffs at the Company's plant between the effective date of the new restriction on the movement of personnel and the date of the trial herein some 6 months later. Compliance proceedings would show if there have been prejudicial layoffs since the trial.

equivalent junior employees were retained, and to make all such affected unit employees whole for any loss they may have suffered by reason of the change, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289, with interest at 6 percent per annum as required under *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, the Trial Examiner issues the following recommended:[24]

ORDER

Respondent Western Electric, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Making any unilateral changes in the pre-existing plantwide movement of personnel at its Shreveport, Louisiana, plant affecting promotions, downgrading, lateral transfers, layoffs and any other terms and conditions of employment of its employees in the above-described appropriate unit during the unexpired term of its collective-bargaining agreement with the above-named Union without first reaching agreement with the Union concerning such changes.

(b) In any like or related manner interfering with, restraining or coercing employees at its Shreveport, Louisiana, plant in the exercise of their rights guaranteed in Section 7 of the Act.

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[24] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Forthwith revoke and rescind, retroactive to November 3, 1970, its unilateral decision and action of that same date limiting and restricting the movement of personnel of unit employees in grades 35 and above at its Shreveport, Louisiana, plant to movement solely within the manager's organization to which they are attached.

(b) Forthwith restore the rights of unit employees in grades 35 and above at its Shreveport, Louisiana, plant to the plantwide movement of personnel they had prior to November 3, 1970.

(c) To forthwith restore to their *status quo ante* all of its Shreveport plant employees adversely affected by the Company's restriction on the former plantwide movement of personnel; to advance such employees to the status they would have if there had been no curtailment of the Company's former practice of plantwide movement of personnel; to reinstate senior employees who may have been laid off in one manager's organization while junior employees in equivalent positions in the other manager's organization had been retained; and to make all such affected unit employees whole for any loss of pay they may have suffered by reason of the restrictive change on the former plantwide movement of personnel, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all promotion, downgrading, lateral transfer, and layoff records, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order and for the restoration of affected employees to their *status quo ante* under the original plantwide movement of personnel.

(e) Post at its plant at Shreveport, Louisiana, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 15, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.[26]

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C.

/s/ MAURICE S. BUSH
Maurice S. Bush
Trial Examiner

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[25] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[26] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL immediately revoke and rescind as of this date our rule of November 3, 1970, restricting movement of personnel for employees in the bargaining unit in grades 35 and above to movement of personnel solely within the manager's organization to which such employees are assigned and attached.

WE WILL immediately restore as of this date to all of our employees in the bargaining unit in grades 35 and above the former plantwide movement of personnel they had prior to our November 3, 1970, restriction thereof.

WE WILL NOT hereafter unilaterally, without the agreement of the Union, make any changes in the preexisting plantwide movement of personnel or in any other way change the established working conditions of the employees in the bargaining unit during the lifetime of a collective bargaining agreement with the Union.

WE WILL forthwith restore to all of our Shreveport plant employees, adversely affected by our restriction on their former plantwide movement of personnel, the status they had before the restriction was put into effect and advance such employees to the status they would have had if the restriction had not been put into effect.

WE WILL reinstate any senior employees who may have been laid off in one manager's organization while junior employees in equivalent positions have been retained.

WE WILL make all unit employees adversely affected by the aforementioned restriction on the preexisting plant-

wide movement of personnel whole for any loss of pay they have suffered by reason of the restriction.

The bargaining unit is:

All hourly-rated production and maintenance employees in the Manufacturing Division of Western Electric, Inc., at its Shreveport, Louisiana plant, but excluding office and plant clerical employees, professional employees, guards, and supervisors as defined in the Act.

WESTERN ELECTRIC, INC.
(Employer)

Dated ——— By ———————————
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, T 6024 Federal Bldg. (Loyola), 701 Loyola Avenue, New Orleans, La. 70113, Tel. No. (504) 527-6361.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(5) provides that it is an unfair labor practice for an employer:

"to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 8(d):

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof,

or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

Section 10(a):

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This

power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 10(c):

"The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings

of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

Section 301(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Supreme Court, U. S.
FILED
JUL 30 1974
JR., CLERK

No. 73-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LOCAL UNIONS NOS. 2188 and 1974, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD and WESTERN ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR WESTERN ELECTRIC COMPANY IN OPPOSITION

BERNARD M. HARTNETT, JR.
LAWRENCE M. JOSEPH
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Attorneys for
Western Electric Company, Inc.
195 Broadway
New York, New York 10007

IN THE

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MEMORANDUM FOR WESTERN ELECTRIC COMPANY IN OPPOSITION

1. The Board found, in each of these consolidated cases, that the dispute between the Company and Unions was essentially contractual in nature and that the parties had voluntarily agreed to resolve the issue by means of the grievance-arbitration provisions of their collective bargaining agreement. Accordingly, the Board (with one Member dissenting), applied its decision in *Collyer Insulated Wire,* 192 NLRB 837. It withheld its own processes, remitted the parties to the grievance-arbitration procedures of their contract and retained jurisdiction so that it could, upon "appropriate and timely motion" by one of the parties, determine whether the dispute had been resolved by amicable settlement in the grievance procedure or submitted to

arbitration, and if so, whether those procedures had been fair and regular and had reached a result not repugnant to the Act (Pet. App. 10a-11a, 41a-42a, 47a-48a).

2. The Court of Appeals held that "the *Collyer* rule of deferral to grievance and arbitration procedures is clearly valid" (Pet. App. 5a).[1] The Court concluded that application of the *Collyer* rule was proper in the circumstances of these cases since, *inter alia*, "the results of an arbitration will very likely be dispositive of the unfair labor practice issue" (Pet. App. 8a).

3. We submit that the Court of Appeals correctly held that the *Collyer* policy "is clearly valid" (Pet. App. 5a) and that it was properly applied here (Pet. App. 8a-9a). In opposing the petition, we are in full agreement with the reasons set forth in the opposition brief of the National Labor Relations Board in this case, and in its opposition to certiorari in *Provision House Workers Union Local 274, AFL-CIO* v. *National Labor Relations Board*, No. 73-1593, this Term.

4. There can be no doubt at this point in the history of the Act that the Board is not required to exercise the full extent of its statutory authority, but may decline to assert

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[1] Every Court of Appeals that has considered the "*Collyer* rule of deferral" has approved it. See, in addition to the decision below, *Associated Press* v. *National Labor Relations Board*, 492 F.2d 662, 666 (D.C. Cir.); *Nabisco, Inc.* v. *National Labor Relations Board*, 479 F.2d 770 (2nd Cir.); *Enterprise Publishing Co.* v. *National Labor Relations Board*, 493 F.2d 1024 (1st Cir.); *Provision House Workers Union Local 274, AFL-CIO* v. *National Labor Relations Board*, 85 LRRM 2863 (9th Cir.). See also *Local 715* v. *National Labor Relations Board (Malrite of Wisconsin, Inc.)*, 494 F.2d 1136 (D.C. Cir.). And see *William E. Arnold Co.* v. *Carpenters District Council No. 73-466*, 86 LRRM 2212, 2214, May 20, 1974, (U.S. Sup. Ct.).

jurisdiction over alleged unfair labor practices if declination would effectuate the purposes of the Act. See, *e.g.*, *National Labor Relations Board* v. *Indiana & Michigan Elec. Co.*, 318 U.S. 9, 18-19; *National Labor Relations Board* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684; *National Labor Relations Board* v. *Plasterers Local Union No. 79*, 404 U.S. 116, 136-137; Section 10(a) of the Act (29 U.S.C. §160(a)). *A fortiori*, the Board may decide, as it did here, merely to *defer* the exercise of jurisdiction until after the parties have utilized their contractual grievance-arbitration provisions.

The Board has frequently shown deference to the arbitration forum when it believed such deference would "serve the fundamental aims of the Act." *International Harvester Co.*, 138 NLRB 923, 925-926. In *Carey* v. *Westinghouse*, 375 U.S. 261, 271, this Court approved the Board's policy of deferral to an existing arbitration award. See also, *National Labor Relations Board* v. *Plasterer's Local Union No. 79, supra.* Contrary to petitioners' suggestion (Pet. 8), there is no distinction between post-award and pre-award deferral cases, either in terms of the Board's authority under the Act, or its underlying policy.[2] Both derive from the same premise, that deferral "[encourages] practices fundamental to the friendly adjustment of industrial disputes . . ." and "the practice and procedure of collective bargaining . . ." Section 1 of the Act (29 U.S.C. 151). As stated in *Arnold Co.* v. *Carpenters District Council, supra,*

[2] No Court has drawn the distinction suggested by Petitioners (Pet. 9). Indeed, the Courts have, at times, grouped the Board's pre-award and post-award decisions together when discussing the Board's deferral policy. See, *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 198 (n. 6); *Carey* v. *General Electric Co.*, 315 F.2d 499, 510 (2d Cir.), *cert. denied*, 377 U.S. 908.

n.1, "The Board's position [in *Collyer*] harmonizes with Congress' articulated concern that, '[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .' Section 203(d) of the LMRA, 29 U.S.C. § 173(d)."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD M. HARTNETT, JR.
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July, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1788

LOCAL UNIONS NOS. 2188 AND 1974,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a-9a) is reported at 494 F. 2d 1087. The Board's decisions and orders (Pet. App. B 10a-104a) are reported at 199 NLRB Nos. 49 and 45.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1974. The petition for a writ of certiorari was filed on May 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly deferred the exercise of its unfair labor practice jurisdiction pending an effort by the parties to resolve the dispute under the grievance and arbitration procedure of their collective bargaining agreement.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. C 105a-108a. Also relevant are the following provisions of—

1. The National Labor Relations Act, as amended (61 Stat. 136-137, 29 U.S.C. 151):

> Section 1. * * * Experience has proved that protection by the law of the right of employees to organize and bargain collectively safeguards commerce from injury * * * be encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> * * * * *
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2. The Labor-Management Relations Act (61 Stat. 154, 29 U.S.C. 173(d)):

> Section 203(d). Final Adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *

STATEMENT

A. The Board's Decision

Western Electric Company ("the Company") manufactures communications equipment at plants throughout the country, including the two plants here involved, located at Shreveport, Louisiana, and Omaha, Nebraska (Pet. App. 12a, 52a, 57a-58a; *I*A. 351, 347; *II*A. 552, 559).[1] For some years production and maintenance employees at the Company's Shreveport and Omaha plants have been represented, respectively, by Local Union Nos. 2188 and 1974, International Brotherhood of Electrical Workers, AFL-CIO ("the Union") (Pet. App. 15a 49a-50a, 58a; *I*A. 18-19; *II*A. 41-42, 257). The collective bargaining agreements at both plants provided for the movement of personnel *(i.e.,* promotion, downgrading, and lateral transfer) within an intra-plant organizational division referred to as a "manager's organization" (Pet. App. 3a, 13a, 15a-16a, 42a-44a, 46a n.2, 60a-61a). In 1969, the Omaha unit employees were restructured into three manager's organizations; there had formerly been only two such groups (Pet. App. 2a-3a, 15a-19a; *II*A. 60, 274-275, 612). In 1970, a similar change was made at the Shreveport plant, creating two manager's organizations in place of one (Pet. App. 3a, 50a; *I*A. 408, 282).

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[1] "*I*A." refers to volume I of the Appendix below; "*II*A.", to volume II.

Before the Board, the Union did not contest the Company's right under the contracts to reorganize the plants in this manner, but urged that the employee movement provisions of the contracts should be applied as if the organizational changes had never occurred (Pet. App. 3a-4a, 13a, 39a, 51a). Any other interpretation of the contracts, according to the Union, would drastically affect the seniority rights of employees since each worker's field of movement would be restricted to the new smaller organization (Pet. 3; Pet. App. 3a, 13a).

The Company, on the other hand, argued that the contractual movement of personnel clause, by its terms, operated to limit each employee's seniority rights to the "manager's organization" to which he was assigned pursuant to the reorganization. Since it was free under the management rights clause of the contract to make the reorganization (Pet. App. 14a n. 2, 59a), the Company contended that it was authorized to give effect to the new organizational structure at each plant in accordance with the literal terms of the movement of personnel clause (Pet. App. 4a, 24a-25a, 26a n. 13, 51a, 67a). In any event, the Company urged, the issue was one of contract interpretation that should be referred to the grievance and arbitration procedure of the collective bargaining agreements, which provided for binding arbitration of such disputes (Pet. App. 12a, 32a-33a and n. 18, 46a-47a and n. 5, 52a, 53a).

The disputes at the Shreveport and Omaha plants came before the Board on separate charges and complaints alleging that the Company had unilaterally changed the working conditions of its employees in violation of Section 8(a)(5) and (1) of the Act (Pet. App. 4a, 12a, 51a-52a).

In each case the Board determined that the dispute centered on the meaning of the movement-of-personnel provisions of the collective bargaining agreement and that this issue could best be resolved through the grievance and arbitration procedure of the agreement (Pet. App. 39a-40a, 46a-47a).

In accordance with its decision in *Collyer Insulated Wire*, 192 NLRB 837, the Board (with one Member dissenting), concluded that it would be appropriate to withhold its processes pending an effort by the parties to resolve the dispute through the contractually agreed upon procedure. The Board thus dismissed the complaints but retained jurisdiction for the "purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular, or have reached a result which is repugnant to the Act" (Pet. App. 10a-11a, 41a-42a, 47a-48a).

B. The Decision of the Court of Appeals

The court of appeals held that the Board's policy "of deferral to grievance and arbitration procedures," announced in *Collyer Insulated Wire, supra*, "is clearly valid" (Pet. App. 5a). The court stated (Pet. App. 5a, 7a):

> It should be understood that the *Collyer* decision and those now under review are not based upon any right of the employer to compel the union to utilize grievance procedures rather than file charges with the Board. Rather, they proceed from the Board's asserted

> power to withhold its processes when to do so will best serve the policies of the Federal labor laws. * * *
>
> * * * * *
>
> We read the *Collyer* doctrine as a balancing rule which requires deferral to arbitration only where a balance of both supporting and antagonistic policies favors deferral. * * *

Deferral was appropriate here, the court concluded, because "arbitration will very likely be dispositive of the unfair labor practice issue": if the Union wins, the Company's compliance with the arbitration award "would moot the instant unfair labor practice complaints"; if the Company's construction of the contract prevails, "there will be no basis for the charge of unilateral action" (Pet. App. 8a-9a). In addition, the dispute "is clearly within the scope of the [contractual] grievance and arbitration procedures"; the Company "has expressed its willingness to arbitrate"; and there is "no suggestion of anti-union animus such that deferral to arbitration would be a futile gesture; nor does the history of the collective bargaining relationship of the parties indicate that arbitration would not be fruitful" (Pet. App. 9a).

ARGUMENT

1. The instant petition challenges an application of the policy announced by the Board in *Collyer Insulated Wire, supra*, 192 NLRB 837, to withhold its processes in appropriate unfair labor practice cases pending an effort by the parties to resolve the underlying contractual dispute through the grievance and arbitration procedure in their collective bargaining agreement. A similar challenge to the Board's *Collyer* policy is raised in the petition in *Provision House Workers Union Local 274, AFL-CIO* v.

National Labor Relations Board, No. 73-1593, October Term, 1973. For the reasons stated in our opposition to the petition for certiorari in that case,[2] we submit that the court below correctly held that the *Collyer* policy "is clearly valid" (Pet. App. 5a) and that it was properly applied here (Pet. App. 8a-9a).

2.a. Petitioners argue that, because "the authority of the Board and the law of the contract are overlapping, concurrent regimes,"[3] an aggrieved party has a right of election to pursue its remedies either before the Board or before an arbitrator and the courts. However, as the court below recognized (Pet. App. 5a), it is well settled that the Board has "considerable discretion to * * * decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." *International Harvester Co.,* 138 NLRB 923, 925-926, quoted with approval in *Carey* v. *Westinghouse Corp.,* 375 U.S. 261, 271. See also discussion at p. 17 of the Board's brief in opposition to certiorari in *Provision House Workers Union Local 274, supra,* No. 73-1593.

b. Petitioners acknowledge (Pet. 8-9) that this Court in *Carey* v. *Westinghouse, supra,* "expressly approved" the Board's longstanding policy of post-award deferral to arbitral decisions. See *Spielberg Manufacturing Company,* 112 NLRB 1080. They seek to distinguish the *Collyer* policy of pre-award deferral to contractual grievance and arbitration procedures on the ground that in these situations "the party asserting the violation of a statutory right has chosen to file an unfair labor practice charge

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[2]Copies of that opposition have been served on the parties to this case.

[3]*National Labor Relations Board* v. *Strong,* 393 U.S. 357, 360.

rather than proceed to arbitration" (Pet. 9). The Board's post-award deferral policy, however, rests not on a theory of election of remedies by the party aggrieved, but on the fact that such deferral effectuates the statutory policies. In *International Harvester, supra,* for example, the individual charging party before the Board had not invoked the contractual grievance procedure; rather it was the respondent union that filed the grievance and won the arbitral award, to which the Board then deferred in dismissing the complaint. 138 NLRB at 925-929, petition for review denied *sub nom. Ramsey* v. *National Labor Relations Board*, 327 F. 2d 784 (C.A. 7), certiorari denied, 377 U.S. 1003.

c. Petitioners dismiss as dictum (Pet. 6) this Court's express approval of the *Collyer* policy in *William E. Arnold Co.* v. *Carpenters District Council,* No. 73-466, decided May 20, 1974, slip op. 4-5. They then quote at length (Pet. 10-13) from the Court's holding in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, that an employee who is unsuccessful in remedying his claim of racial discrimination through a contractual grievance and arbitration procedure is not thereby barred, on an election-of-remedies theory, from maintaining a court action under Title VII of the Civil Rights Act of 1964 (78 Stat. 253, 42 U.S.C. 2000e, *et seq.).* However, as noted in the Board's opposition to certiorari in *Provision House Workers, supra*, No. 73-1593, pp. 17-18, that decision is not controlling here, for Congress in enacting the Civil Rights Act chose to rely on private suits as the primary means of vindicating the rights of individuals conferred by Title VII. And, significantly, such suits are under the control of the individual complainant, rather than his collective bargaining representative which controls the presentation under the grievance procedure. By contrast,

Congress in the National Labor Relations Act sought to encourage "practices fundamental to the friendly adjustment of industrial disputes" and "the practice and procedure of collective bargaining" (Section 1, *supra*, p. 2), and adopted a procedure which empowers, but does not require, the Board to exercise its unfair labor practice jurisdiction. Moreover, Congress specifically expressed a preference for "final adjustment by a method agreed upon by the parties * * * [as] the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" (Labor-Management Relations Act, Section 203(d), *supra*, p. 3). In contrast to the situation under Title VII, the "parties" referred to—the union and employer—are the same in either the Board or the grievance proceedings.

d. Finally, petitioners attack the Board's *Collyer* policy as dilatory because it could involve a three-step procedure: (1) a Board proceeding to determine that the case was appropriate for deferral; (2) an arbitration proceeding; and (3) another Board proceeding to determine whether the arbitration procedure was fair and regular and whether the result reached was repugnant to the Act (Pet. 14-15). However, one of the purposes of the *Collyer* policy is to encourage the parties to settle their disputes voluntarily through the contractually agreed upon procedures without resort to the Board or the courts. To the extent that the policy is successful, it will result in speedy disposition of those cases that are subject to settlement, and will help the Board and the courts to give more prompt attention to those cases that must go to litigation under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1974.

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IN THE

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OCTOBER TERM, 1974

No. 73-1788

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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY MEMORANDUM

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1. Since the primary role of this Court is to resolve important questions of federal law, the most noteworthy point about the briefs in opposition is that they do not deny that the "validity of the [Board's] *Collyer* doctrine is a question of unusual importance in the administration of the National Labor Relations Act." Pet. p. 7.

2. A further major function of this Court is to preserve the integrity of its own reasoned precedents. For this reason it is significant that the Board's attempted distinction of *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (Pet. pp. 10-13) rests on misconceptions of *both* statutes which it is comparing. It is inaccurate to state that Congress "chose to rely on private suits as the primary means of vindicating the rights of individuals conferred by Title VII" of the Civil Rights Act (Bd. Br. p. 8). For, as was explained in *Alexander*, it is a prerequisite for a private suit under Title VII that the prospective plaintiff file a timely charge of employment discrimination with the EEOC and receive and act upon the EEOC's statutory notice of the right to sue (415 U.S. at 47). Incredibly, the Board also misstates the remedial scheme under the National Labor Relations Act: "In contrast to the situation under Title VII, the 'parties' referred to [in § 203(d)]—the union and employer—are the same in either the Board or the grievance proceedings." (Bd. Br. p. 9). Of course, the right to file a charge and to appear as a party in an unfair labor practice proceeding before the Board is not limited to unions and employers. Indeed, the right of an employee to file a charge is protected against restraint by his employer (§ 8(a)(4) of the Act), his union (§ 8(b)(1)(A) of the Act as interpreted in *Labor Board* v. *Marine and Ship Building Workers*, 391 U.S. 418), or a State (*Nash* v. *Florida Industrial Commission*, 389 U.S. 235).

Thus, the analogy which this Court drew in *Alexander* between the remedial schemes under the Civil Rights Act and the National Labor Relations Act (415 U.S. at 50) was entirely sound; compare *Alexander, id.* at 47 ("parallel or overlapping remedies"), with

NLRB v. *Strong,* 393 U.S. 357, 360 ("concurrent overlapping remedies"). Like the Tenth Circuit decision which was reversed in *Alexander,* the Board's *Collyer* policy subordinates statutory rights to contractual rights. Certiorari should be granted to decide the question—not raised in *Provision House Workers,* No. 73-1593, to which respondents would assimilate this case—whether *Alexander* and *Collyer* can co-exist.

3. Finally, respondents' insistence (Bd. Br. p. 7; Co. Br. pp. 2-3) that the *Collyer* policy is merely an exercise of Board discretion, brings into play this Court's traditional responsibility—frequently exercised in Labor Board cases—to confine administrative discretion within the bounds established by Congress. While "the Board has 'considerable discretion to * * * decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act' " (Bd. Br. p. 7), Congress has already declared one of those "fundamental aims" to be "to give impetus to the various ways of settling labor disputes * * * [and] to emphasize and protect, in cases of doubt, and to give priority to, statutorily declared rights", *NLRB* v. *Huttig Sash & Door Co.,* 377 F.2d 964, 969-970 (C.A. 8) (Pet. pp. 15-16), a case respondents prefer to ignore. In making this choice (see Pet. p. 13), the Taft-Hartley Congress adhered to the view of the Wagner Act Congress which, during the passage of the bill had stricken a provision whereunder

> "the Board may, in its discretion, defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement . . . ." 1 Leg. Hist. of the National Labor Relations Act (1935) at p. 1301; II *Id.* at p. 2351.

In sum,

> "where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' American Ship Building Co. v. National Labor Relations Board, 380 U.S., [300] at 318.
>
> * * * Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.' National Labor Relations Board v. Babcock & Wilcox Co., [351 U.S. 105] at 112-113." *Labor Board* v. *Brown,* 380 U.S. 278, 292.

CONCLUSION

For the reasons stated herein and in the Petition, certiorari should be granted.

Respectfully submitted,

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